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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EMC MORTGAGE CORPORATION,
Petitioner,

v.

STANLEY WILLIAM STARK; PATRICIA GARNET STARK,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The parties to an arbitration agreement in a mortgage contract expressly agreed that any damages that might be awarded "shall in no event include consequential, punitive, exemplary or treble damages as to which borrower and lender expressly waive any right to claim to the fullest extent permitted by law." The District Court refused to enforce an arbitrator's award of punitive damages based on this plain language. The Eighth Circuit reversed, reinstating the arbitral award of $6 million in punitive damages to Respondents, which exceeded Respondents' actual damages of $2,000 by a ratio of 3000:1. The Eighth Circuit based its ruling on a new and unforeseeable reading of Missouri law (one that the court had rejected three years earlier) as prohibiting the waiver of punitive damages for intentional torts—a reading that Petitioner EMC Mortgage Corporation ("EMC") was not on fair notice of, and that the parties could not possibly have intended to incorporate into their arbitration agreement when they entered into it. The questions presented are:

1. Did the Eighth Circuit deprive petitioner EMC of "'fair notice . . . of the conduct that will subject [it] to punishment'" in violation of due process, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *BMW of North America v. Gore*, 517 U.S. 559, 574 (1996)), when it overturned the parties' settled expectations and express agreement that punitive damages could not be awarded by the arbitrator, based on its unforeseeable reading of state law?

2. Does an arbitrator "manifestly disregard the law" when he imposes a punitive damage award that cannot, on its face, be reconciled with this Court's precedents establishing outer due-process limits on the magnitude of punitive damage awards?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner and Defendant EMC Mortgage Corporation ("EMC"), a Delaware corporation, is a wholly-owned subsidiary of The Bear Stearns Companies, which is also a Delaware corporation.

Respondents and Plaintiffs Stanley William Stark and Patricia Garnet Stark are natural persons.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER THE EIGHTH CIRCUIT'S NOVEL AND UNEXPECTED READING OF MISSOURI LAW DEPRIVED PETITIONER OF "FAIR NOTICE" OF THE CONDUCT THAT WOULD SUBJECT IT TO PUNISHMENT, IN VIOLATION OF DUE PROCESS 11

A. The Eighth Circuit's Decision Represents A Novel And Unexpected Change in Missouri Law That Contradicts The Eighth Circuit's Own Prior Ruling On This Issue. 12

B. The Eighth Circuit's Decision Raises Important And Substantial Issues Regarding Fair Notice And Retroactive Punishment In the Arbitration Context 15

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE DUE PROCESS CLAUSE ESTABLISHES LIMITS ON THE SIZE OF PUNITIVE DAMAGE AWARDS IMPOSED BY ARBITRATORS. 18

CONCLUSION 27

TABLE OF AUTHORITIES

Pages

CASES

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813 (1986) 18

Alack v. Vic Tanny Int'l of Mo., Inc.,
923 S.W.2d 330 (Mo. 1996) 7, 12, 13

Barnes v. Logan,
122 F.3d 820 (9th Cir. 1997) 24

Barnett v. La Societe Anonyme Turbomeca France,
963 S.W.2d 639 (Mo. App. 1998) 8, 22

BMW of North America v. Gore,
517 U.S. 559 (1996) ..... *passim*

Bowen v. Amoco Pipeline Co.,
254 F.3d 925 (10th Cir. 2001) 24

Bradley v. School Bd. of Richmond,
416 U.S. 696 (1974) 22

Chisholm v. Kidder, Peabody Asset Mgmt., Inc.,
966 F. Supp. 218 (S.D.N.Y. 1997) 26

Cole v. Burns Int'l Sec. Servs.,
105 F.3d 1465 (D.C. Cir. 1997) 25

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 16, 19

Davis v. Prudential Sec., Inc.,
59 F.3d 1186 (11th Cir. 1995) 24

Dawahare v. Spencer,
210 F.3d 666 (6th Cir. 2000) 22

De Veau v. Braisted,
363 U.S. 144 (1960) 17

DeFrancesco v. Western Pa. Water Co.,
478 A.2d 1295 (Pa. 1984) 14

Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383 (2d Cir. 2003) 8

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 25

Gallus Invs., L.P. v. Pudgie's Famous Chicken, Ltd.,
134 F.3d 231 (4th Cir. 1998) 24

Gannon v. Circuit City Stores, Inc.,
262 F.3d 677 (8th Cir. 2001) 7, 12, 14

Halligan v. Piper Jaffray, Inc.,
148 F.3d 197 (2d Cir. 1998) 25

Hoffman v. Cargill Inc.,
236 F.3d 458 (8th Cir. 2001) 8

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 17

Liberty Financial Management Corp. v. Beneficial Data Processing Corp.,
670 S.W.2d 40 (Mo. 1984) 13

Louis Vuitton S.A. v. Spencer Handbags Corp.,
765 F.2d 966 (CA2 1985) 17

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 7, 15

Matteson v. Ryder Sys. Inc.,
99 F.3d 108 (3d Cir. 1996) 25

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 11

Porush v. Lemire,
6 F. Supp. 2d 178 (E.D.N.Y. 1998) 24

Posttape Assocs. v. Eastman Kodak Co.,
537 F.2d 751 (3d Cir. 1976) 14, 15

Randolph v. IMBS, Inc.,
368 F.3d 726 (7th Cir. 2004) 11, 19

Rifkind & Sterling, Inc. v. Rifkind,
28 Cal. App. 4th 1282 (1994) 24

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 24

Sawtelle v. Waddell & Reed, Inc.,
754 N.Y.S.2d 264 (N.Y. App. Div. 2003) 24

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

The GMS Group, LLC v. Benderson,
326 F.3d 75 (2d Cir. 2003) 26

Todd Shipyards Corp. v. Cunard Line, Ltd.,
943 F.2d 1056 (9th Cir. 1991) 24

United States v. Schooner Peggy,
5 U.S. (1 Cranch) 103 (1801) 22

Valhal Corp. v. Sullivan Associates,
44 F.3d 195 (3d Cir. 1995) 14

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,
489 U.S. 468 (1989) 9, 12, 19

Wilko v. Swan,
490 U.S. 477 (1989) 24

CONSTITUTIONAL PROVISIONS

U.S. CONST., amend. V 1

STATUTES

9 U.S.C. § 10 24

15 U.S.C. § 1692k 11, 19, 21

28 U.S.C. § 1254 1

28 U.S.C. § 1292 1

29 U.S.C. § 621 26

STATE STATUTES

Mo. Rev. Stat. § 569.021 21

Mo. Rev. Stat. § 569.140 21

Mo. Rev. Stat. § 569.150 21

OTHER AUTHORITIES

4 Williston on Contracts § 602A (3d ed.) 14

6A Corbin on Contracts, § 1472 (1962) 14

57A Am. Jur. 2d Negligence §§ 49-67 14

76 C.J.S. Release §§ 63-67 14

Cox, Reflections Upon Labor Arbitration, 72 HARV. L. REV. 1482 (1959) 25

PETITION FOR A WRIT OF CERTIORARI

Petitioner EMC Mortgage Corporation ("EMC") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS AND ORDERS BELOW

The Eighth Circuit's August 26, 2004 decision reversing the district court's order vacating in part the arbitral award of punitive damages in this case (Pet. App. 1a-14a) is reported at 381 F.3d 793. The District Court's May 8, 2003 amended order confirming in part and vacating in part the arbitrator's award in this case (Pet. App. 15a-20a) is unreported. The arbitrator's September 9, 2002 "Declaration of Law and Limited Findings of Fact," concluding that he had the power to award punitive damages in this case (Pet. App. 22a-23a), is unreported. The arbitrator's November 25, 2002 award (Pet. App. 24a-34a) is unreported.

JURISDICTION

The Eighth Circuit entered its judgment on August 26, 2004. It then denied EMC's timely petition for panel rehearing and rehearing en banc, with three judges voting to grant rehearing en banc, on November 5, 2004. Pet. App. 21a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST., amend. V.

For the relevant statutory provisions, please see Pet. App. 35a-36a.

STATEMENT OF THE CASE

This case presents two significant questions regarding the application of this Court's punitive damages jurisprudence under the Due Process Clause to the increasingly important and widely used forum of arbitration. The Eighth Circuit's reinstatement of an arbitrator's 3000:1, $6 million punitive damages award highlights the extent to which the lower courts require this Court's authoritative guidance on the constitutional limits to punitive damages awards in this context. The Eighth Circuit's decision directly undermines the longstanding federal policies favoring arbitration, protecting against arbitrary and excessive awards of punitive damages, and ensuring the expeditious and limited recovery of damages under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692o. The decision disrupts a commercially significant area of federal law in which Congress specifically intended parties to be able to bargain for, and rely with certainty upon, predispute arbitration contracts as a means of preventing such arbitrary, excessive, and erratic punitive damage awards.

1. In 1999, Respondents borrowed money from EMC's predecessor and secured the loan with a mortgage on their house. They entered into an agreement to arbitrate or mediate any disputes that might arise between the parties. Pet. App. 15a-16a. Both in their Deed of Trust and in a separate Acknowledgement and Agreement to Mediate or Arbitrate that they executed, Respondents expressly agreed with EMC's predecessor as follows:

> IF THE APPOINTED ARBITRATOR SHOULD AWARD ANY DAMAGES, SUCH DAMAGES SHALL BE LIMITED TO ACTUAL AND DIRECT DAMAGES AND SHALL IN NO EVENT INCLUDE CONSEQUENTIAL, PUNITIVE, EXEMPLARY OR TREBLE DAMAGES AS TO WHICH BORROWER AND LENDER EXPRESSLY WAIVE ANY RIGHT TO

CLAIM TO THE FULLEST EXTENT PERMITTED BY LAW.

Pet. App. 18a, 40a, 64a. In the Deed of Trust, Respondents also expressly agreed that the lender could "do . . . whatever is necessary to protect the value of the Property and Lender's rights in the Property," including "entering on the Property." Pet. App. 53a.

The next year, Respondents defaulted on their loan, invoked bankruptcy protections, vacated their home, and moved into an apartment across the street. Pet. App. 3a. From October 2000 to March 2001, EMC allegedly attempted to contact Respondents personally by, for example, mailing several mandatory notices to Respondents themselves, instead of their lawyer. Pet. App. 2a.

2. These attempts gave rise to a lawsuit filed by Respondents against EMC in April 2001, alleging only violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692o, and related federal statutes, under which punitive damages were not recoverable. Pet. App. 2a, 16a-17a; *see infra*, at 19.

After the District Court ordered the dispute to be referred to arbitration, EMC carried out its contractual obligation to investors in loans securitized by properties such as the Starks' to secure the premises by retaining a company to ensure that Respondents' vacant home was protected from the elements and from vandalism. Acting pursuant to the terms of the Deed of Trust signed by Respondents, an employee of the company entered Respondents' vacant home to post a sign in the front window that read in full: "'Property has been secured and winterized. Not for sale or rent. In case of emergency call 1st American (732) 363-3626.'" Pet. App. 3a.

After this sign was posted, Respondents amended their complaint to add a state-law tort claim of intentional infliction of emotional distress, for which they sought punitive damages. Pet. App. 3a; Appellee's Appendix ("AA") at 226. Respondents initially requested only "$165,285" in punitive

damages, and submitted a paucity of evidence on this newly added claim. AA at 36; Appellants' Appendix at 409.[1]

3. In his September 9, 2002 "Declaration of Law and Limited Findings of Fact," the arbitrator acknowledged that the arbitration agreement "specifically states that the Arbitrator cannot award punitive damages." Pet. App. 23a. He then asserted, without any support from the text of the agreement, that "[i]n at least three places the Stark's [sic] are promised that they can seek all damages allowed by law, and then that promise is taken away." *Id.* The arbitrator relied on this unsupported premise to conclude that "[t]his is the keystone of an ambiguous contract, and the Agreement is to be interpreted in [Respondents'] favor. As a matter of law they are not prohibited from seeking punitive damages from EMC." *Id.*

Two and a half months later, the arbitrator awarded Respondents "$1,000.00" in "actual damages," "$1,000.00" in "statutory damages," plus attorneys' fees and the costs of the arbitration, and "punitive damages [i]n the amount of $6,000,000.00." Pet. App. 29a.[2] The arbitrator found that

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[1] For example, when Mr. Stark was asked by his own attorney whether he thought that "people in town were aware of" the posting of the sign, Mr. Stark responded, "I don't know." AA at 73. And when his own attorney asked him whether he had "ever experienced any stress related to this," Mr. Stark responded: "Well, yes, I guess. Yes." AA at 75. When Mrs. Stark was asked by her own attorney whether "people" have "mentioned the sign in the window," Mrs. Stark stated: "I don't know so much about the sign, but when they – we've had people asking if they can buy [the house]." AA at 131. Indeed, when asked whether one can read what the sign says "[i]f you're standing out on the street," Mrs. Stark responded, "I don't know." AA at 147.

[2] The arbitrator punished EMC based on the completely irrelevant net worth of its parent company, and based on his subsequently corrected miscalculation of what one percent of that parent company's net worth was. As the Eighth Circuit explained (mistakenly confusing EMC, a non-public company, with its parent): "The arbitrator indicated the award of punitive damages was calcu-

even though Respondents had vacated their home well before the property-preservation company entered the premises to post the sign, "this conduct [was] reprehensible and outrageous and in total disregard of plaintiff's [sic] legal rights." Pet. App. 28a.

4. Respondents filed a motion with the District Court to confirm the award. EMC filed a cross-motion arguing *inter alia* that the parties drafted their agreement to make it "clear and unequivocal" that there could be no punitive damages and that the award here was so excessive as to violate due process. Appellants' Appendix at 263, 269-71.

While "mindful that the parties bargained for an arbitrator's decision, not a judicial decision, that deference is due to an arbitrator's interpretation of the parties' agreement, and that the grounds for vacating an award are quite narrow," the District Court recognized that "this is a circumstance in which the award of punitive damages may, and must be, vacated." Pet. App. 18a-19a. The court reasoned as follows:

> After reviewing the documents in question, the Court respectfully disagrees with the Arbitrator's conclusion that the availability of punitive damages is ambiguous. The parties identified three sources of rules to govern their arbitral obligations, and declared that one – their written agreement – would govern in the event of any conflict between them. The parties also specifically agreed that the arbitrator could not award punitive damages. This is not amenable to an interpretation that punitive damages could be awarded, and the Court concludes the Arbitrator exceeded his authority in awarding them.

[Footnote continued from previous page]

lated as one percent of EMC's shareholder equity. One percent of equity, however, would have resulted in an award of $60,000,000. The arbitrator later clarified this mistake indicating it was his intent to award $6,000,000." Pet. App. 4a n.1.

Pet. App. 19a (footnote omitted). Consequently, on May 8, 2003, the District Court vacated the arbitral award of punitive damages, and otherwise confirmed the arbitrator's award. Pet. App. 20a.

5. On August 26, 2004, a panel of the Eighth Circuit (Bye, Heaney, and Smith, JJ.) reversed the district court's vacatur of the arbitral award of punitive damages. Pet. App. 1a-14a. In his opinion for the court, Judge Bye "conclude[d] [that] the arbitration agreement unambiguously *permitted* the award of punitive damages," and concluded in the alternative that the arbitrator's award "was not irrational" because the arbitrator "could reasonably conclude" that the arbitration "agreement is ambiguous" as to whether punitive damages were awardable and because any ambiguity should be resolved in Respondents' favor. Pet. App. 7a-11a (second emphasis in original).

The Eighth Circuit reached out in this case to reinstate a $6 million punitive damage award that exceeded Respondents' actual damages of $2,000 by a 3000:1 ratio, based on the following convoluted reading of the arbitration contract and of Missouri law. (1) The arbitration contract's express waiver of and limitation on punitive damages (any damages awarded "shall in no event include consequential, punitive, exemplary or treble damages as to which Borrower and Lender expressly waive any right to claim") waives the right to claim punitive damages "'to the fullest extent permitted by law.'" Pet. App. 8a (quoting Pet. App. 40a). (2) The Agreement states that "[t]he laws applicable to the arbitration proceeding shall be the laws of the state in which the property which secures the Transaction is located." Pet. App. 9a, 39a, 63a. (3) Therefore, Missouri law supposedly governs the question of the waivability of punitive damages, even though the contract explicitly recites that the arbitration is governed by its terms and by the Federal Arbitration Act and the rules of the American Arbitration Association. Pet. App. 39a. (4) Under Missouri law, "'there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the

public interest.'" Pet. App. 8a (quoting *Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 337 (Mo. 1996)). (5) According to the Eighth Circuit, "[a]n attempt to procure a waiver of punitive damages is an attempt to exonerate oneself from future liability for intentional torts or gross negligence, because the remedy of punitive damages would otherwise be available for such acts." Pet. App. 8a.

The court cited no authority in support of extending *Alack* or the authorities cited by *Alack*, which deal only with the separate question of waiver of *liability* for entire claims or causes of action sounding in tort, to the waiver of particular forms of relief that may be available under such claims. *See id.* at 8a-9a; *but see infra*, at 12-14. And three years before its decision in this case, the Eighth Circuit had reached the exact opposite conclusion, finding that nothing in Missouri law suggests that parties are precluded from limiting the availability of punitive damages in their arbitration contracts. *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681-82 (8th Cir. 2001).

In support of its alternative holding that the arbitrator's finding of an ambiguity was not irrational, the Eighth Circuit explicitly analogized this case to *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). Pet. App. 10a. "As in *Mastrobuono*," the court reasoned, "an arbitrator interpreting this agreement could reasonably conclude the apparent conflict between the arbitration clause and the choice of laws provision introduced an ambiguity into the agreement." Pet. App. 10a. In so reasoning, however, the Eighth Circuit apparently overlooked the fact that the arbitration agreement in *Mastrobuono* "contain[ed] no express reference to claims for punitive damages," *Mastrobuono*, 514 U.S. at 59, in contrast to the arbitration agreement at issue here.

In the final section of its opinion, the Eighth Circuit rejected EMC's argument that the arbitral award of punitive damages was arbitrary and excessive and violated due process, applying minimal scrutiny under the "manifest disregard of the law" standard. Pet. App. 11a-12a ("'[A]n arbitration

decision only manifests disregard for the law where *the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.*'") (quoting *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461-62 (8th Cir. 2001) (emphasis in original)); *see also id.* at 12a ("'A party seeking vacatur [based on manifest disregard of the law] bears the burden of proving that the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it.'") (quoting *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003)).

Even though the ratio of punitive to compensatory damages in this case is 3000:1, the Eighth Circuit rejected EMC's argument that the arbitral award of punitive damages could not withstand scrutiny under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). It reached this result in part because "[t]he arbitrator's decision predates *State Farm* making it impossible for the arbitrator to have identified the decision as controlling." Pet. App. 13a n.3.

The Eighth Circuit concluded that "it is apparent the arbitrator did not disregard governing law" because:

> The arbitrator's award was intended to punish EMC and to deter others from similar conduct. In arriving at the appropriate amount, the arbitrator specifically found the $6,000,000 award (amounting to one-tenth of one percent of shareholder equity) was "not great punishment but it should act as a deterence [sic]." Appellee's app. at 18; *see also Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 655 (Mo. App. 1998) (holding under Missouri law the net worth of a defendant is relevant when determining the extent of punitive damages necessary to punish and deter the defendant).

Pet. App. 13a.

6. On November 5, 2004, the Eighth Circuit denied EMC's timely petition for rehearing en banc and rehearing by the panel, with Judges Wollman, Riley, and Gruender voting for rehearing en banc. Pet. App. 21a.

REASONS FOR GRANTING THE WRIT

This case squarely presents questions of exceptional importance. The Eighth Circuit's opinion retroactively imposes an unconstitutional punishment without the kind of fair notice mandated by the Due Process Clause, and contravenes three important federal policies, each of which independently would warrant this Court's protection. In reinstating a punitive damages award that was 3000 times greater than Respondent's actual damages, and that was imposed pursuant to an arbitration agreement expressly precluding punitive damages, the Eighth Circuit's decision contravened: (1) the federal policy favoring arbitration and the corollary that parties should be able to establish and rely on the parameters of arbitration and the arbitrator's powers with certainty; (2) the due-process protections against arbitrary and excessive punitive damage awards; and (3) the policy favoring the expeditious and limited recovery of damages under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692o.

"[D]ue regard must be given to the federal policy favoring arbitration." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989). That policy would be undermined if parties could not bargain for, establish, and rely with certainty upon limits on the scope of arbitration and the power of arbitrators. After all,

> [a]rbitration under the [Federal Arbitration] Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, . . . , so too may they specify by contract the rules under which that arbitration will be conducted.

489 U.S. at 479 (citation omitted).

Here, Respondents and EMC's predecessor bargained for protection under the FAA and the rules of the American Arbitration Association against the "acute danger of arbitrary deprivation of property" posed by "punitive damages." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). They did so by explicitly agreeing that any damages that might be awarded "shall in no event include consequential, punitive, exemplary or treble damages as to which Borrower and Lender expressly waive any right to claim." Pet. App. 40a.

The Eighth Circuit nonetheless held that the arbitrator's award of punitive damages must be enforced, thereby declining to "give effect to the contractual rights and expectations of the parties," *Volt*, 489 U.S. at 479. It did so based on a novel reading of state law that EMC could not reasonably have anticipated. EMC was therefore deprived of "'fair notice . . . of the conduct that will subject [it] to punishment'" as mandated by the Due Process Clause. *State Farm*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574). This conflict with a recent decision of this Court introduces significant uncertainty to the law governing arbitration, will be a powerful disincentive to use of the arbitration process, and therefore warrants review in its own right.

The Eighth Circuit's opinion does more than deprive parties of fair notice that their conduct is subject to punishment by an arbitrator. Although that due-process deprivation alone is a strong disincentive to arbitration, the court's confirmation of the particular award imposed in this case, and its rationale for doing so, add an independent and powerful deterrent. The inadequate level of scrutiny accorded by the Eighth Circuit to an arbitrator's plainly excessive punitive damages award deprives parties of yet another Due Process Clause guarantee – the protection against arbitrary and excessive punitive damages awards. Other federal and state courts have taken various approaches to review of arbitral awards in general, and the enforcement of punitive damages awards in

particular, further threatening the certainty necessary to encouragement of the arbitration process.

Compounding the due process deprivations caused by the Eighth Circuit's opinion is the added threat to the policy favoring the expeditious and limited recovery of non-punitive damages under the FDCPA, which provided the original basis for Respondents' complaint in this case. *See, e.g.*, 15 U.S.C. § 1692k(a) (limiting the amount of damages to the amount of "actual damage sustained" and, in individual actions, "such additional damages as the court may allow, but not exceeding $1,000"); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 728 (7th Cir. 2004) ("violations of the FDCPA generally lead to small penalties and never to punitive damages"). Each of these various errors in the court's opinion, and each ill effect stemming from those errors, is reason enough for this Court to grant review.

I. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER THE EIGHTH CIRCUIT'S NOVEL AND UNEXPECTED READING OF MISSOURI LAW DEPRIVED PETITIONER OF "FAIR NOTICE" OF THE CONDUCT THAT WOULD SUBJECT IT TO PUNISHMENT, IN VIOLATION OF DUE PROCESS

"The Due Process Clause . . . prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. . . . The reason is that '[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'" *State Farm*, 538 U.S. at 416-17 (quoting *Gore*, 517 U.S. at 564) (other citations omitted). "'Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior.'" *State Farm*, 538 U.S. at 418 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)).

The Eighth Circuit's decision to reinstate the 3000:1, $6 million punitive damage award based on a convoluted and novel reading of state law deprived EMC of constitutionally mandated fair notice of the conduct that could subject it to punishment, and warrants this Court's review.

A. The Eighth Circuit's Decision Represents A Novel And Unexpected Change in Missouri Law That Contradicts The Eighth Circuit's Own Prior Ruling On This Issue

Until the Eighth Circuit announced its unprecedented decision in this case, no state or federal court had held that Missouri law precluded parties to an arbitration agreement from expressly waiving the right to claim punitive damages in disputes arising out of a contractual relationship. The Eighth Circuit itself has recognized this fact. *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681-82 (8th Cir. 2001).

1. The only case directly cited by the Eighth Circuit in support of its novel holding was *Alack v. Vic Tanny International of Missouri, Inc.*, 923 S.W.2d 330 (Mo. 1996), but nothing in *Alack* supports, even in dicta, such a broad limitation on parties' freedom to contract and "to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479 (citation omitted). *Alack* dealt with the very different question of whether parties may waive their *liability* for entire "claims" or causes of action sounding in tort, rather than whether they could freely agree to limit or waive particular forms of relief that might be available under such claims. *Alack*, 923 S.W. 2d at 332, 337-38 (repeatedly referring to "claims" arising from the other party's negligence). In *Alack*, after all, the contract provision at issue "purport[ed] to shield Vic Tanny from liability for '**any** damages', '**any** . . . injuries' and '**any** and **all** claims, demands, damages, rights of action, present or future . . . resulting from or arising out of the Member's . . . use . . . of said gymnasium or the facilities and equipment thereof.'" *Id.* at 337 (emphases in original).

Read in context, then, the passage quoted by the Eighth Circuit from *Alack*—"there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest," Pet. App. 8a (quoting *Alack*, 923 S.W.2d at 337)—referred only to such wholesale attempts at exonerating oneself from *liability* for "any and all" "*claims*" of "negligence," "gross negligence," or "intentional tor[t]." 923 S.W.2d at 337. Even with respect to such attempts at exonerating oneself from all future *liability* for any and all *claims* sounding in tort arising from a contractual relationship, *Alack* held that such waivers of liability could be enforced if they were sufficiently "clear, unambiguous, unmistakable, and conspicuous." 923 S.W.2d at 337 ("The exculpatory language must effectively notify a party that he or she is releasing the other party from *claims* arising from the other party's own negligence.") (emphasis added); *id.* ("A contract that purports to relieve a party from *any and all claims* but does not actually do so is duplicitous, indistinct and uncertain.") (emphasis added). On the facts before it, the *Alack* Court held "that the exculpatory clause was ambiguous and [the] defendant health club did not insulate itself from *liability* for future negligence because the exculpatory clause did not use the word 'negligence' or 'fault' or their equivalents so that a clear and unmistakable waiver occurred." 923 S.W.2d at 332 (emphasis added).

2. All of the other authorities cited in support of the passage quoted by the Eighth Circuit from *Alack* also dealt with whether parties may waive their *liability* for entire "claims," rather than whether they could limit or waive particular *forms of relief* under such claims. Pet. App. 8a (citations omitted). In *Liberty Financial Management Corp. v. Beneficial Data Processing Corp.*, for example, the court upheld the contractual waiver of "*liability* for merely negligent failures to perform" the contract, distinguishing such a waiver from a waiver of liability for "willful or grossly negligent acts in violation of the contract." 670 S.W.2d 40, 47-48 (Mo. 1984) (emphasis added). Again, the court was not even contem-

plating a waiver of, or limitation on, particular kinds of relief (*e.g.*, punitive damages) that might be awardable for claims of simple negligence, gross negligence, intentional tort, or breach of contract.

Similarly, in 6A Corbin on Contracts, § 1472 (1962) and the current cumulative supplement, the Eighth Circuit's broad reading of limitations on the waiver of punitive damages finds no support. The treatise discusses and gives examples primarily of courts upholding or denying enforcement of contractual provisions that purport to exempt a party from all *liability* for entire *claims* or causes of action for negligence, gross negligence, or intentional tort. *See id.*; *see also* 57A Am. Jur. 2d Negligence §§ 49-67 (same); 76 C.J.S. Release §§ 63-67 (same); 4 Williston on Contracts § 602A (3d ed.) (same).

It is therefore unsurprising that the Eighth Circuit itself, in a published opinion in 2001—after the decision in *Alack*, stated that "Missouri courts have not suggested that it is improper for parties to include . . . terms [limiting the availability of punitive damages] in their [arbitration] contracts." *Gannon,* 262 F.3d at 681-82. And it is telling that the Eighth Circuit in its opinion in this case could not cite any cases actually holding, or even specifically suggesting, that punitive damages cannot be waived as a matter of Missouri law in agreements to arbitrate disputes arising out of a contractual relationship.

3. Indeed, even elsewhere in the Eighth Circuit, there do not appear to be any cases holding that express waivers of punitive damages in agreements to arbitrate disputes arising out of a contractual relationship are, as a *general* matter, unenforceable. Rather, most courts "recognize that there are differences between a contract which insulates a party from liability and one which merely places a limit upon that liability." *E.g.*, *Valhal Corp. v. Sullivan Associates*, 44 F.3d 195, 202 (3d Cir. 1995) (citing *DeFrancesco v. Western Pa. Water Co.*, 478 A.2d 1295, 1306 (Pa. 1984); *Posttape Assocs. v.*

Eastman Kodak Co., 537 F.2d 751, 755 (3d Cir. 1976) ("The difference between the two clauses 'is . . . a real one.'")).

B. The Eighth Circuit's Decision Raises Important And Substantial Issues Regarding Fair Notice And Retroactive Punishment In The Arbitration Context

The plain language of the arbitration agreement leaves no question that the parties intended to waive punitive damages. Even assuming *arguendo* that Respondents and EMC's predecessor intended to incorporate whatever state-law restrictions might have existed on the waivability of punitive damages when they appended "to the fullest extent permitted by law" to their express waiver provision,[3] neither EMC's predecessor nor anyone in its position could have reasonably known that such restrictions included a supposed (and hitherto unidentified) Missouri-law restriction on the waivability of punitive damages. Consequently, EMC and its predecessor were deprived of the fair notice to which they were constitutionally entitled that a court, in enforcing an arbitral award of damages, could subject them to a severe punishment in the form of punitive damages.

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[3] Of course, this assumption is wholly implausible, particularly given that the parties explicitly contracted for the arbitration to be governed by the contract's terms, the FAA, and the rules of the American Arbitration Association. This Court rejected a similar notion in *Mastrobuono*. *See* 514 U.S. at 63 ("As a practical matter, it seems unlikely that petitioners were actually aware of New York's bifurcated approach to punitive damages," under which courts, but not arbitrators, could award punitive damages, when they agreed to the New York choice-of-law clause in their arbitration contract). Here, the notion that the parties were aware punitive damages could be awarded under their arbitration agreement is even more implausible, because, unlike *Mastrobuono*, the parties did expressly refer to punitive damages in their arbitration contract. *Compare Mastrobuono*, 514 U.S. at 59 ("The [arbitration] agreement contains no express reference to claims for punitive damages.").

1. This Court has repeatedly articulated the need for, and importance of, such fair notice in the context of punitive damage awards, which "pose an acute danger of arbitrary deprivation of property":

> The Due Process Clause . . . prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *Cooper Industries[, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424,] 433 [(2001)]; [*BMW of North America, Inc. v.] Gore*, 517 U.S. [559,] 562 [(1996)]. . . . The reason is that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574. . . .
>
> . . .
>
> Although [punitive damage] awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered.

State Farm, 538 U.S. at 416-17 (citations omitted).

That is why this Court both in *State Farm* and *Cooper Industries* mandated "[e]xacting appellate review" to "ensur[e] that an award of punitive damages is based upon an '"application of law, rather than a decisionmaker's caprice."'" *State Farm*, 538 U.S. at 418 (quoting *Cooper Industries*, 532 U.S. at 436)).

The Eighth Circuit's decision to reinstate the 3000:1, $6 million punitive damage award deprived EMC of fair notice. No one who had signed an arbitration agreement excluding punitive damages could have reasonably expected that its conduct could result in such a punishment. The Eighth Cir-

cuit had to contort and remake Missouri law and ignore its own prior decision in *Gannon* to reach this result.

2. The Eighth Circuit's imposition of punitive damages without fair notice raises retroactivity and due process concerns that have long been the focus of the precedents of this Court and other courts since at least the founding of the Republic. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted").

Specifically,

> [r]etroactive imposition of punitive damages would raise a serious constitutional question. See *Turner Elkhorn*, 428 U.S. at 17 (Court would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness"); *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) ("The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts"). See also *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (CA2 1985) (retroactive application of punitive treble damages provisions of Trademark Counterfeiting Act of 1984 "would present a potential *ex post facto* problem").

Landgraf, 511 U.S. at 281.

Such retroactivity and due process concerns are particularly heightened where, as here, the Eighth Circuit's novel extension of state law completely scuttles the parties' settled expectations, embodied in their express agreement that punitive damages would not be awardable in any dispute arising out of their contractual relationship. Such settled expectations take on an added dimension where, as here, they are grounded in contract. *Cf., e.g.*, *Landgraf*, 511 U.S. at 271

("The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.") (citing cases); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986) (characterizing appellant's argument "that the retrospective imposition of punitive damages under a new cause of action violates its rights under the Contracts Clause" as an "important issu[e] which, in an appropriate setting, must be resolved").

In sum, the Eighth Circuit's reliance on an unforeseeable and unprecedented reading of state law to void the parties' express waiver of punitive damages in this case contravenes the very principle of fair notice that has always been at the core of the Due Process Clause and warrants this Court's review. This Court should grant the petition to address this important due process issue regarding the interplay between arbitration and punitive damages.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE DUE PROCESS CLAUSE ESTABLISHES LIMITS ON THE SIZE OF PUNITIVE DAMAGE AWARDS IMPOSED BY ARBITRATORS

This Court should also grant review to decide whether an arbitrator who inflicts a punitive damage award that on its face violates the due process limits established by this Court in *State Farm* and *Gore* has, by definition, manifestly disregarded the law. The Eighth Circuit, like several other Circuits, essentially exempted arbitral punishments from due process scrutiny – a far-reaching and harmful proposition that contradicts at least three important and longstanding federal policies. First, of course, this Court has repeatedly expressed concerns about the dangers of unlimited punitive damages and has imposed due process limits on such awards. *State Farm*, 538 U.S. at 417. Second, this Court's precedents under the Federal Arbitration Act have long promoted the federal policy favoring arbitration, and underscored the corollary

principle that parties should be able to rely with certainty on the limits of arbitration and arbitrators' powers. *See, e.g.*, *Volt*, 489 U.S. at 476, 479. Third, the Fair Debt Collection Practices Act aims to provide expeditious and limited recovery of damages to debtors deserving relief. *See, e.g.*, 15 U.S.C. § 1692k(a) (limiting the amount of damages recoverable under the FDCPA to the amount of "actual damage sustained" and, in individual actions, "such additional damages as the court may allow, but not exceeding $1,000"); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 728 (7th Cir. 2004) ("violations of the FDCPA generally lead to small penalties and never to punitive damages").

The Eighth Circuit's approach in this case undermines the strong federal policy favoring arbitration and encouraging parties to agree to arbitrate their disputes. Indeed, if parties cannot, with reasonable certainty, contract to prohibit punitive damages in arbitration, and cannot be assured of any semblance of due process review of massive punitive damage awards imposed by arbitrators, they have every incentive to avoid arbitration and resolve their disputes in court instead. This is an issue of nationwide importance that deserves the attention of this Court.

1. The facial invalidity of the arbitral award of punitive damages in this case is not even a close call, under this Court's precedents in *State Farm*, *Cooper Industries*, and *BMW v. Gore*. It bears repeating that the sole basis for the award of punitive damages in this case was the posting of the sign in the front window of Respondents' vacant house by a property-preservation company retained by EMC. *See supra*, at 3. The facial invalidity of the punitive damage award here is readily apparent from even a cursory application of the "three guideposts" established by this Court in *Gore* and *State Farm*: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or

imposed in comparable cases." *State Farm*, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575).

First, in assessing the "degree of reprehensibility," it is noteworthy that the allegedly tortious conduct did not "evinc[e] an indifference to or a reckless disregard of the health or safety of others." *State Farm*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 576-77). The house was vacant, after all. Moreover, there was no evidence showing that the sign-posting "was the result of intentional malice, trickery, or deceit." *Id.* If anything, it was a prudent measure taken by EMC in carrying out its contractual responsibility to secure the premises. Nor was the sign-posting violent or "repeated"; rather, it "was an isolated incident." *Id.*

Second, as for "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award," little more need be said than that the ratio here is 3000:1 ($6 million in punitive damages based on $2,000 in actual damages). As this Court made clear in *State Farm*, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425 (citations omitted). Ratios in excess of 9:1 are unconstitutional except in the rarest of cases where, as is not the case here, the conduct complained of is exceptionally reprehensible or egregious and the compensatory damages are inadequate. *See id.* This Court in *State Farm* noted that it had previously suggested in two prior cases that a 4:1 ratio "might be close to the line of constitutional impropriety." *Id.* (citations omitted). Indeed, it explained in *State Farm* that legislatures have historically authorized sanctions providing for double (1:1), triple (2:1), or quadruple (3:1) damages, and these traditional ratios, while not "binding," are "instructive" for purposes of the *Gore* analysis. *Id.* Oftentimes, even a 1:1 ratio "can reach the outermost limit of the due process guarantee." *Id.* Here, the 3000:1 ratio clearly reaches far beyond this outermost limit prescribed by the Constitution. Insofar as the Eighth Circuit and the arbitrator were swayed by EMC's alleged wealth, *see, e.g.*, Pet. App. 13a, 28a-29a, their analysis was

further tainted by improper considerations. *See, e.g., State Farm*, 538 U.S. at 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

Third, the "disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases'" is marked here. *Id.* at 428 (citing *Gore*, 517 U.S. at 575). The maximum fine that could have been imposed for the conduct in this case is $2,000. Mo. Rev. Stat. §§ 569.140 (first degree trespass is a class B misdemeanor), 569.150 (second degree trespass is an infraction), 569.021 (maximum penalty against a corporation for a class B misdemeanor is $2,000, and $500 for an infraction). (Even felonies by corporations carry a maximum penalty of only $10,000. Mo. Rev. Stat. § 569.021.) Indeed, the FDCPA (which does not authorize punitive damages awards, *see supra*, at 19), sets the maximum penalty in individual actions as "additional damages" of $1,000 over and above "actual damage[s]," and the maximum penalty in class actions is $500,000. *See* 15 U.S.C. § 1692k(a)(1)-(2). Here, again, $6,000,000 in punitive damages was awarded, dwarfing any of these comparable penalty amounts prescribed by Missouri and federal law.

Finally, it bears noting, again, that neither EMC nor its predecessor was on fair notice that punitive damages in *any* amount could be awarded in this case. *See supra*, at 11-15.

2. The Eighth Circuit nonetheless brushed aside all relevant factors for assessing the constitutionality of a punitive damages award, relying on the general rule that arbitral awards receive only a minimal degree of judicial scrutiny. *See, e.g., supra*, at 7-8 ("'[A]n arbitration decision only manifests disregard for the law where *the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.*'"); *id.* ("'A party seeking vacatur [based on manifest disregard of the law] bears the burden of proving that the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in ef-

fect, ignoring it.'"); *see also* Pet. App. 11a-12a ("Because '[a]rbitrators are not required to elaborate their reasoning supporting an award,' . . . '[i]f they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law.'") (quoting *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000)).[4]

The sum total of the Eighth Circuit's *BMW v. Gore* due process analysis in this case is as follows:

> [I]t is apparent the arbitrator did not disregard governing law. The arbitrator's award was intended to punish EMC and to deter others from similar conduct. In arriving at the appropriate amount, the arbitrator specifically found the $6,000,000 award (amounting to one-tenth of one percent of shareholder equity) was "not great punishment but it should act as a deterence [sic]." Appellee's app. at 18; *see also Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 655 (Mo. App. 1998) (holding under Missouri law the net worth of a defendant is relevant when determining the extent of punitive damages necessary to punish and deter the defendant).

Pet. App. 13a.

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[4] As noted above, the Eighth Circuit concluded that this Court's decision in *State Farm* was irrelevant because it post-dated the arbitrator's ruling, and thus could not have been cited to or identified by him. *See supra*, at 8; *but see Landgraf*, 511 U.S. at 264 (referring to "the rule that 'a court is to apply the law in effect at the time it renders its decision'" (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.) ("if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied"). This Court made clear in *State Farm*, however, that its decision followed from and clarified extant law set forth in *BMW v. Gore*, *Cooper Industries*, and other cases. *See, e.g.*, *State Farm*, 538 U.S. at 416-19.

The Eighth Circuit's manner of applying the standard for review of arbitral awards is wholly incapable of protecting against a punitive damages award that violates due process. Presumably all punitive damage awards (even unconstitutionally excessive ones) are "intended to punish" the tortfeasor and "to deter others from similar conduct." The Eighth Circuit's reliance on EMC's alleged net worth also fails to redeem its *Gore* analysis, because such reliance is illegitimate for purposes of a proper application of the Due Process Clause's protection against arbitrary and excessive punitive damage awards. In *Gore,* the Court declared: "The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." 517 U.S. at 585.

Likewise, the Court in *State Farm* recognized that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," and explained that wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm." 538 U.S. at 427. Rather, wealth "'provides an open-ended basis for inflating awards when the defendant is wealthy.'" *Id.* at 427-28 (quoting *Gore*, 517 U.S. at 591 (Breyer, J., concurring)).

The kind of minimalist and vacuous judicial scrutiny of arbitral awards of punitive damages undertaken and authorized by the Eighth Circuit in this case underscores the pressing need for review by this Court.

3. The case law outside the Eighth Circuit on review of arbitral punitive damages awards offers little hope that this issue will be clarified absent this Court's intervention. Many cases go so far as to hold—erroneously—that there is no judicial scrutiny of arbitral awards of punitive damages at all, because no state action is supposedly involved, even though the arbitral award itself is meaningless absent state action in

the form of a court order enforcing and compelling compliance with the award. Other cases so hold because the parties supposedly submitted voluntarily to the resolution of their dispute by an arbitrator. *See, e.g.*, *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940 (10th Cir. 2001) (citations omitted); *Gallus Invs., L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231, 234 (4th Cir. 1998); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191-92 (11th Cir. 1995); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991); *Porush v. Lemire*, 6 F. Supp. 2d 178, 186 (E.D.N.Y. 1998); *Rifkind & Sterling, Inc. v. Rifkind*, 28 Cal. App. 4th 1282, 1284, 1291 (1994).

Other courts, as was the case here, call for varying degrees of minimal scrutiny under the "manifest disregard of the law" standard.[5] *See, e.g.*, *Barnes v. Logan*, 122 F.3d 820, 824 (9th Cir. 1997); *but see Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264, 270 (N.Y. App. Div. 2003) ("A grossly excessive award that is arbitrary and irrational under

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[5] Although not explicitly provided for in the statutory grounds for vacatur of an arbitral award set forth in the FAA, 9 U.S.C. § 10, the "manifest disregard of the law" ground for vacating arbitral awards is now commonly accepted. The phrase appears to originate from the following dicta in this Court's decision in *Wilko v. Swan*: "In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation." 346 U.S. 427, 436-37 (1953) (emphasis added) (footnote and citations omitted), *overruled on other grounds, Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) ("The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, *e.g.*, 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko v. Swan*, 346 U.S. 427, 436-437 (1953) (parties bound by arbitrator's decision not in "manifest disregard" of the law), overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).").

Gore should be equally arbitrary and irrational under the FAA.").

4. This Court should grant review and make clear that when an arbitrator imposes a punitive damages award that flatly violates this Court's due process guideposts, it *ipso facto* has manifestly disregarded the law. Such a conclusion is required given dangers posed by punitive damages and the "[e]xacting appellate review" called for by this Court in *State Farm* to "ensur[e] that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm*, 538 U.S. at 417-18.

The need for this Court to declare enforcement of such awards a violation of the manifest disregard standard is particularly warranted where, as here, the contracting parties agreed to an express limitation on the power of the arbitrator to award punitive damages. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (noting "the significance of having arbitrators decide the scope of their own powers") (citing Cox, Reflections Upon Labor Arbitration, 72 HARV. L. REV. 1482, 1508-09 (1959)); *Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 113 n.6 (3d Cir. 1996) ("If arbitrators are given great deference as to the scope of their powers under a submission, then not only will arbitrators have virtually unreviewable authority over the interpretation of the collective bargaining agreement but they will also have such authority over the very limits of their power.").

5. At least two Circuits have applied the "manifest disregard" standard in a manner that takes into consideration the importance of the rights at stake. *See, e.g., Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1478, 1486 (D.C. Cir. 1997) (explaining that "the resolution of statutory *or constitutional* issues is a primary responsibility of courts," in rigorously applying "manifest disregard of the law" scrutiny to the arbitral resolution of statutory rights in that case) (emphasis added); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998) (applying rigorous and thoroughgoing "manifest disregard of the law" scrutiny to the arbitral award at issue in that

case, because statutory rights under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, were also at stake); *see also Chisholm v. Kidder, Peabody Asset Mgmt., Inc.*, 966 F. Supp. 218, 226 (S.D.N.Y. 1997) ("Judge Edwards has written a long and thoughtful opinion in the *Cole* case advocating that the term manifest disregard be interpreted to involve more substantial judicial oversight in claims raised under the ADEA.") (citation omitted); *but see The GMS Group, LLC v. Benderson*, 326 F.3d 75, 77 (2d Cir. 2003) (disagreeing that *Halligan* applied a greater level of scrutiny than the conventional "manifest disregard" standard).

If plain violations of important statutory rights by arbitrators warrant reversal under the manifest disregard standard, then *a fortiori* an arbitrator's denial of *constitutional* rights—particularly fundamental due process rights to be free from arbitrary deprivations of property—should be overturned.

Because, as noted above, state and federal courts have been unsuccessful in their efforts to devise a clear and consistent answer to the question, this Court should grant review to decide whether arbitral decisions that fly directly in the face of this Court's due process protections against excessive punitive damages awards must be reversed for "manifest disregard of the law." Fundamental due process principles established by *State Farm* and *Gore* forbid federal courts from enforcing punishments that plainly violate the Constitution.

CONCLUSION

Petitioner EMC was not afforded the fair notice to which it was constitutionally entitled when the Eighth Circuit relied on an unforeseeable and unprecedented reading of state law to overturn the parties' settled expectation and express agreement that punitive damages could not be awarded by the arbitrator. Moreover, the three longstanding federal policies favoring arbitration, protection against arbitrary and excessive awards of punitive damages, and the expeditious and limited recovery of damages under the FDCPA would be unduly undermined by enforcing arbitral awards of punitive damages that plainly exceed the limits of the Due Process Clause.

This Court should therefore grant the petition for a writ of certiorari.

Respectfully submitted.

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February 2, 2005

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2366

Stanley William Stark; Patricia Garnet Stark	*	
Plaintiffs - Appellants,	*	Appeal from the United States District Court for the Western District of Missouri
vs.	*	
Sandberg, Phoenix & von Gontard, P.C.; Scott Greenberg; EMC Mortgage Corporation; SpvG Trustee,	*	
Defendants - Appellees.	*	

Submitted: January 15, 2004
Filed: August 26, 2004

Before BYE, HEANEY and SMITH, Circuit Judges.

BYE, Circuit Judge.

Stanley and Patricia Stark appeal the district court's order vacating in part an arbitration award granting them punitive damages. We reverse.

I

Stanley and Patricia are husband and wife and live near Kansas City, Missouri. In 1999, in hopes of shoring up a failing business, the Starks borrowed $56,900 against their home and secured the loan with a mortgage. Despite the infusion of funds, the business failed and in April 2000 the Starks petitioned for bankruptcy protection. At about the same time, the Starks' lender sold the note, which was in default, to EMC Mortgage Corporation making EMC a debt collector under the provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692o. In anticipation of foreclosure, the Starks vacated the home and moved into an apartment across the street. The Starks, however, remained in possession of legal title and did not abandon the home. In June 2000, EMC's motion to lift the automatic stay was granted and it proceeded with foreclosure.

The Starks were represented throughout the foreclosure and bankruptcy proceedings by attorney Roy True who notified EMC's attorney, Scott Greenberg of Sandberg, Phoenix & von Gontard, P.C., that his representation of the Starks extended beyond the bankruptcy proceedings. Between October 2000 and March 2001, despite letters from True advising EMC he represented the Starks and not to contact them directly, EMC tried several times to deal directly with the Starks. In April 2001, the Starks filed suit against EMC and its attorneys alleging violations of the FDCPA.

EMC moved to compel arbitration as required by the parties' loan agreement, and the district court ordered the dispute submitted to arbitration. The order compelling arbitration is not at issue in this appeal. During the pendency of

the arbitration, EMC's agent, without the Starks' consent, forcibly entered the home and posted a sign in the front window indicating the "Property has been secured and winterized. Not for sale or rent. In case of emergency call 1st American (732) 363-3626." The agent then contacted Mrs. Stark at her apartment, and EMC contacted Mr. Stark at work regarding the matter. Further, on November 5, 2001 and January 27, 2002, EMC wrote to the Starks directly regarding insurance coverage on the home. In total, the Starks testified EMC contacted them by mail, telephone or in person at least ten times after being advised they were represented by counsel.

After these incidents, the Starks moved to amend their complaint to include claims alleging intentional torts against EMC and seeking punitive damages. EMC opposed the motion arguing the arbitration agreement expressly precluded an award of punitive damages. The Starks contended the limitation on punitive damages was unconscionable and unenforceable. After extensive briefing, the arbitrator concluded the limitation was ambiguous and construed the language against EMC. The arbitrator noted the agreement purported to grant him "all powers provided by law" and then purported to deny the power to award "punitive . . . damages . . . as to which borrower and lender expressly waive any right to claim to the fullest extent permitted by law." The arbitrator concluded,

> In at least three places the Stark's [sic] are promised that they can seek all damages allowed by law, and then that promise is taken away. This is the keystone of an ambiguous contract, and the Agreement is to be interpreted in their favor. As a matter of law they are not prohibited from seeking punitive damages from EMC.

Appellee's app. at 22.

The arbitrator found EMC violated the FDCPA and awarded the Starks $1000 each in statutory damages, $1000 each in actual damages, $22,780 in attorneys fees, and $9300 for the cost of the arbitration. The arbitrator found EMC's forcible entry into the premises. "reprehensible and outrageous and in total disregard of plaintiff's [sic] legal rights" and awarded $6,000,000 in punitive damages against EMC. *Id.* app. at 17.[1]

The Starks moved to confirm the award, and EMC moved to vacate the punitive damages award arguing the arbitration agreement expressly prohibited punitive damages. No other aspect of the award was challenged. The district court vacated the award of punitive damages, holding the agreement was unambiguous and not susceptible to the arbitrator's interpretation.

On appeal, the Starks contend the arbitrator acted within his authority in construing the contract and his finding of an ambiguity was not irrational. EMC argues the district court's order vacating the award of punitive damages should be affirmed.

II

When reviewing a district court's order confirming or vacating an arbitral award, the court's findings of fact are reviewed for clear error and questions of law are reviewed de novo. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S.

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[1] The arbitrator indicated the award of punitive damages was calculated as one percent of EMC's shareholder equity. One percent of equity, however, would have resulted in an award of $60,000,000. The arbitrator later clarified this mistake indicating it was his intent to award $6,000,000. Thus, the award was actually calculated as one-tenth of one percent of shareholder equity.

938, 947-48 (1995); *Titan Wheel Corp. of Iowa v. Local 2048, Int'l Ass'n of Machinists & Aerospace Workers*, 253 F.3d 1118, 1119 (8th Cir. 2001).

When reviewing an arbitral award, courts accord "an extraordinary level of deference" to the underlying award itself, *Keebler Co. v. Milk Drivers & Dairy Employees Union, Local No. 471*, 80 F.3d 284, 287 (8th Cir. 1996), because federal courts are not authorized to reconsider the merits of an arbitral award "even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Bureau of Engraving, Inc. v. Graphic Communication Int'l Union, Local 1B*, 284 F.3d 821, 824 (8th Cir. 2002) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987)). Indeed, an award must be confirmed even if a court is convinced the arbitrator committed a serious error, so "long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." *Bureau of Engraving*, 284 F.3d at 824 (quoting *Misco*, 484 U.S. at 38).

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, established "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Thus, the FAA only allows a district court to vacate an arbitration award

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by

> which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

Similarly, under 9 U.S.C. § 11 a reviewing court may only modify the arbitrator's award

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11.

A "district court must take the award as it finds it and either vacate the entire award using section 10 or modify the award using section 11." *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 721 (8th Cir. 1999). The deference owed to arbitration awards, however, "is not the equivalent of a grant of limitless power," *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674*, 916 F.2d 63, 65 (2d Cir. 1990), and "courts are neither entitled nor encouraged simply to 'rubber stamp' the interpretations and decisions of arbitrators." *Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 113 (3d Cir. 1996). Thus, courts may also vacate arbitral awards which are "completely irrational" or "evidence[] a manifest disre-

gard for the law." *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001) (internal quotations and citations omitted).

An award is "irrational where it fails to draw its essence from the agreement" or it "manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it." *Id.* at 461-62. "An arbitrator's award draws its essence from the [parties' agreement] as long as it is derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention." *Johnson Controls, Inc., Sys. & Servs. Div. v. United Ass'n of Journeymen*, 39 F.3d 821, 825 (7th Cir. 1994) (internal quotations omitted).

Faced with these limitations on a court's ability to review arbitration awards, EMC argues the arbitrator's award of punitive damages was properly vacated under § 10 because the arbitrator exceeded his powers by modifying the unambiguous agreement, and properly modified under § 11 because in considering the issue of punitive damages the arbitrator made a decision on a matter not submitted to him.[2] EMC also argues the arbitrator's finding of an ambiguity was irrational and without foundation in reason or fact because the clear language of the agreement precludes an award of punitive damages. Finally, EMC argues the award of punitive damages was excessive and made in manifest disregard of the law. Because we conclude the arbitration agreement unambiguously *permitted* the award of punitive damages, we hold the award of punitive damages was proper and reverse the district court.

---

[2] EMC's § 11 argument is clearly without merit. The issue of punitive damages was submitted to the arbitrator. If the award was improper because it exceeded the scope of the agreement, § 10 is the proper avenue to redress the arbitrator's error.

III

The plain language of the arbitration agreement states the "borrower and lender expressly waive any right to claim [punitive damages] *to the fullest extent permitted by law*." Appellee's app. at 19 (emphasis added). Thus, the agreement only effected *a limited* waiver of punitive damages, that is, punitive damages were waived only if the governing law permitted such a waiver. Conversely, if the law did not permit the waiver of punitive damages, the arbitration agreement unambiguously preserved the right to claim them.

Under Missouri law "there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest." *Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 337 (Mo. 1996) (citing *Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40, 48 (Mo. App. 1984) (in turn citing 6A Corbin on Contracts, § 1472 (1962)). An attempt to procure a waiver of punitive damages is an attempt to exonerate oneself from future liability for intentional torts or gross negligence, because the remedy of punitive damages would otherwise be available for such acts. Thus, Missouri law did not permit EMC to exonerate itself from liability for the intentional torts committed against the Starks by procuring the punitive damages waiver, and the arbitrator did not exceed his authority in awarding punitive damages.

We recognize the FAA allows parties to incorporate terms into arbitration agreements that are contrary to state law. *See UHC Mgmt. Co. v. Computer Sciences. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) (holding "[p]arties may choose to be governed by whatever rules they wish regarding how an arbitration itself will be conducted.") (citation omitted). Thus, had the parties to this agreement intended its interpretation to be governed solely by the FAA, the punitive damages waiver might have barred any such award. The plain

language of the agreement, however, makes it clear Missouri law applies to this issue.

The agreement's arbitration clause provides,

> **Arbitration**. To the extent allowed by *applicable law*, any Claim . . . shall be resolved by binding arbitration in accordance with (1) the Federal Arbitration Act, . . . (2) the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association . . . and (3) this Agreement.

Appellee's app. at 19 (emphasis added).

The agreement then defines applicable law as "the *laws of the state* in which the property which secures the Transaction is located." *Id.* (emphasis added). In other words, the agreement makes clear the parties intent to apply Missouri state substantive law while operating within the framework of the FAA, American Arbitration Association rules and the agreement. As previously noted, the punitive damages waiver expressly states the parties intended to waive punitive damages only to the extent permitted by Missouri law. Because Missouri law would not permit a waiver under the facts of this case, we hold the arbitrator's award of punitive damages was proper.

IV

Alternatively, while we believe the plain meaning of the agreement supports the award of punitive damages, we also conclude the arbitrator's finding of an ambiguity was not irrational.

The arbitration clause states any claims will be resolved in accordance with the FAA, which permits a waiver of punitive damages. The choice of laws provision, however, states claims must be resolved in accordance with "applicable [Missouri] law," which does not permit the waiver of puni-

tive damages argued for by EMC in this case. Thus, an arbitrator could reasonably conclude this agreement is ambiguous.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995), the Supreme Court considered the juxtaposition of a choice of laws provision prohibiting punitive damages with an arbitration clause permitting an award of punitive damages. The Court concluded "[a]t most, the choice-of-law clause *introduces an ambiguity into an arbitration agreement* that would otherwise allow punitive damages awards." *Id.* (Emphasis added). As in *Mastrobuono*, an arbitrator interpreting this agreement could reasonably conclude the apparent conflict between the arbitration clause and the choice of laws provision introduced an ambiguity into the agreement. Accordingly, the Supreme Court's recognition that an ambiguity is created when an agreement purports to be governed by conflicting state and federal law is instructive, and supports the arbitrator's finding of an ambiguity.

Additionally, we cannot ignore well-settled precedent from this court holding state contract law governs whether an arbitration agreement is ambiguous. *See Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 946 (8th Cir. 2001). Under Missouri law, "[t]he primary rule in the interpretation of a contract is to ascertain the intention of the parties and to give effect to that intention." *Speedie Food Mart, Inc. v. Taylor*, 809 S.W.2d 126, 129 (Mo. Ct. App. 1991). The test for determining if an ambiguity exists in a written contract is "whether the disputed language, in the context of the entire agreement, is reasonably susceptible of more than one construction giving the words their plain meaning as understood by a reasonable average person." *Speedie Food Mart*, 809 S.W.2d at 129.

In this case, EMC argues the exclusionary language is clear and unambiguous and shields it from liability for any award of punitive damages. When viewed in the context of

Missouri law governing exculpatory clauses, however, this clause could easily be viewed as ambiguous. "A 'latent ambiguity' arises where a writing on its face appears clear and unambiguous, but some collateral matter makes the meaning uncertain." *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 359, 362 (Mo. 1991) (en banc) (citation omitted). Here, the ambiguity arises because the clause attempts to effect a prospective waiver of rights which Missouri law holds may not be waived. Under Missouri law "there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest." *Alack*, 923 S.W.2d at 337 (citations omitted). Words purporting to waive claims which cannot be waived "demonstrate the ambiguity of the contractual language." *Id.*

Finally, EMC "cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono*, 514 U.S. at 62 (citations omitted). EMC "cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result." *Id.* at 63.

Accordingly, we conclude the arbitrator's finding that the contract was ambiguous was not irrational.

V

EMC next argues the award of punitive damages was properly vacated because it is excessive and exhibits a manifest disregard of the law. We disagree.

"Beyond the grounds for vacation provided in the FAA, an award will only be set aside where it is completely irrational or *evidences a manifest disregard for the law.*" *Hoffman*, 236 F.3d at 461 (internal citations and quotations omitted) (emphasis added). "These extra-statutory standards are extremely narrow: . . . [A]n arbitration decision only mani-

fests disregard for the law where *the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.*" *Id.* at 461-62 (citing *Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 749-50 (8th Cir. 1986)) (emphasis added).

"A party seeking vacatur [based on manifest disregard of the law] bears the burden of proving that the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it." *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003). Because "[a]rbitrators are not required to elaborate their reasoning supporting an award," *El Dorado Sch. Dist. #15 v. Continental Cas. Co.*, 247 F.3d 843, 847 (8th Cir. 2001) (internal quotations omitted), "[i]f they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law. *W. Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995)).

Manifest disregard of the law "is more than a simple error in law or a failure by the arbitrators to understand or apply it; and, it is more than an erroneous interpretation of the law." *Duferco Int'l*, 333 F.3d at 389 (citations omitted). "Our disagreement with an arbitrator's interpretation of the law or determination of the facts is an insufficient basis for setting aside his award." *El Dorado Sch. Dist.*, 247 F.3d at 847 (citing *Hoffman*, 236 F.3d at 462).

In support of its claim, EMC argues the arbitrator disregarded the Supreme Court's pronouncements in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-74 (1996) (describing a 500:1 ratio of punitive to compensatory damages as "breathtaking" and suspicious), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) (finding a 145:1 ratio of punitive to compensatory damages presumptively excessive). In so arguing, however, EMC has failed to

present any evidence that the arbitrator "clearly identif[ied] the applicable, governing law and then proceed[ed] to ignore it." *Hoffman*, 236 F.3d at 461-62 (citing *Stroh Container*, 783 F.2d at 749-50). None of the cases relied upon by EMC are cited in the arbitrator's decision,[3] and there is nothing in the record to demonstrate "one of the parties clearly stated the law and the arbitrator[] expressly chose not to follow it." *W. Dawahare*, 210 F.3d at 670; *see also Duferco Int'l*, 333 F.3d at 390 ("In determining an arbitrator's awareness of the law, we impute only knowledge of governing law identified by the parties to the arbitration.") (citation omitted).

Indeed, to the extent the arbitrator's decision sets forth the basis for the punitive damages award, it is apparent the arbitrator did not disregard governing law. The arbitrator's award was intended to punish EMC and to deter others from similar conduct. In arriving at the appropriate amount, the arbitrator specifically found the $6,000,000 award (amounting to one-tenth of one percent of shareholder equity) was "not great punishment but it should act as a deterence [sic]." Appellee's app. at 18; *see also Barnett v. La Societe Anonyme Turborneca France*, 963 S.W.2d 639, 655 (Mo. App. 1998) (holding under Missouri law the net worth of a defendant is relevant when determining the extent of punitive damages necessary to punish and deter the defendant). Accordingly, we reject EMC's claim of manifest disregard.

"Although this result may seem draconian, the rules of law limiting judicial review and the judicial process in the arbitration context are well established and the parties . . . can be presumed to have been well versed in the consequences of

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[3] The arbitrator's decision predates *State Farm* making it impossible for the arbitrator to have identified the decision as controlling.

their decision to resolve their disputes in this manner." *Stroh Container*, 783 F.2d at 751. Moreover, "[a]rbitration is not a perfect system of justice, nor it is [sic] designed to be." *Hoffman*, 236 F.3d at 462 (citation omitted). Rather, it "is designed primarily to avoid the complex, time-consuming and costly alternative of litigation." *Id.*

> In the arbitration setting we have almost none of the protections that fundamental fairness and due process require for the imposition of this form of punishment. Discovery is abbreviated if available at all. The rules of evidence are employed, if at all, in a very relaxed manner. The factfinders (here the panel) operate with almost none of the controls and safeguards [present in traditional litigation.]

Lee v. Chica, 983 F.2d 883, 889 (8th Cir. 1993) (Beam, J. concurring in part and dissenting in part).

Here, EMC chose to resolve this "dispute quickly and efficiently through arbitration." *Schoch v. Infousa, Inc.*, 341 F.3d 785, 791 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 1414 (2004). Indeed, it was EMC that insisted on removing the matter to arbitration. In so doing, EMC "got exactly what it bargained for." *Id.* "Having entered such a contract, [EMC] must subsequently abide by the rules to which it agreed." *Hoffman*, 236 F.3d at 463 (citation omitted).

VI

We reverse the district court's order vacating the award of punitive damages and remand with instructions to confirm the arbitrator's award in its entirety.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

STANLEY WILLIAM STARK and PATRICIA GARNET STARK,	)	
Plaintiffs,	)	
vs.	)	Case No. 01-0407-CV-W-3-ECF
SANDBERG, PHOENIX & VON GONTARD, P.C. *et al.*,	)	
Defendants.	)	

AMENDED ORDER CONFIRMING IN PART AND VACATING IN PART ARBITRATOR'S AWARD[1]

On January 23, 1999, Plaintiffs Stanley and Patricia Stark (the "Starks") borrowed $56,900 from United Companies Lending Corporation ("United") and executed a Promissory Note ("Note") in connection with the loan. The Note

[1] The only differences between this Amended Order and the Order issued on May 5, 2003, involve the correction of the monetary amounts awarded by the arbitrator. The May 5 Order misstated the amount awarded in two respects.

was secured by a Deed of Trust that encumbers the Stark's home. The Deed of Trust contained an agreement to mediate or arbitrate. The Starks also executed a separate Acknowledgment and Agreement to Mediate or Arbitrate, the terms of which are identical to those contained in the Deed of Trust. The Note was eventually assigned to EMC Mortgage Corporation ("EMC"), and SPvG Trustee, Inc. ("SPvG") was named successor trustee. EMC alleged that Plaintiffs defaulted in meeting their obligations under the Note and Deed of Trust. EMC retained the law firm of Sandberg, Phoenix & von Gontard, P.C., to pursue collection, and Scott Greenberg of that law firm represented EMC for this purpose.

On May 25, 2001, Plaintiffs sued EMC, SPvG, the law firm and Greenberg (collectively "Defendants"); the Amended Complaint seeks actual and statutory damages for alleged violations of the Fair Debt Collection Practices Act ("FDCPA") and the Truth in Lending Act ("TILA"). The Amended Complaint also alleged that the Starks rescinded this transaction (and were entitled to damages) in light of violations of the Home Ownership and Equity Protection Act of 1994 ("HOEPA"); however, Plaintiffs sought and received leave to dismiss their HOEPA claims. *See* Order dated July 23, 2001.

On August 17, 2001, the Court granted Defendants' Motion to Compel Arbitration. The hearing was held in late August 2002, and on September 9, 2002 the arbitrator issued a Declaration of Law and Limited Findings of Fact which addressed only two issues: whether Plaintiffs could seek punitive damages, and whether they had made a submissible case for punitive damages. The arbitrator answered both questions in the affirmative (the latter answer applying only to EMC), directed EMC to provide financial information to Plaintiffs' attorney, and set a time for the hearing to reconvene. On November 25, 2002, the Arbitrator issued his final decision and determined (1) each Plaintiff was entitled to

$1,000.00 in statutory damages and $1,000 for actual damages, with EMC and the law firm being jointly and severally liable, (2) Plaintiffs were entitled to attorney fees in the amount of $22,780.00, to be paid by EMC, (3) EMC was to pay punitive damages in the amount of $6 million, and (4) EMC was to pay the Arbitrator's fee and all costs. SPvG was discharged, there being no finding of liability against it. On November 29, the Arbitrator issued an Addendum similarly discharging Greenberg.

Plaintiffs and EMC have filed a multitude of pleadings addressing the award of punitive damages; no other aspect of the Arbitrator's decision is challenged. Plaintiffs argue the amount should be increased or the matter remanded to the Arbitrator for clarification;[2] EMC argues the award of punitive damages should be vacated because the arbitration agreement forbids an award of punitive damages. None of the Arbitrator's other decisions are contested. The Court agrees with EMC and confirms the Arbitrator's award in its entirety except for the award of punitive damages, which is vacated. In a paragraph entitled "Arbitration," the parties' agreement states

> To the extent allowed by applicable law, any Claim . . . shall be resolved by binding arbitration in accordance with (1) the Federal Arbi-

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[2] Contrary to EMC's argument, Plaintiffs' argument about the ambiguity in the calculation of punitive damages appears valid. The Arbitrator indicated that his award was "one percent of shareholders' equity," but the figures recited by the Arbitrator indicated that this calculation would have resulted in an award of $60 million. Whether the Arbitrator meant to award the number he cited or the actual product of his calculation is unclear, and would likely require further input from the Arbitrator to be resolved.

> tration Act, 9 U.S.C. §§ 1-9; (2) the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association (the "Arbitration Rules") then in effect; and (3) this Agreement. If the terms of this Agreement and the Arbitration Rules are inconsistent, the terms of this Agreement shall control. . . . The parties agree that the arbitrator shall have all powers provided by law, this Agreement, and the Loan Agreements. However, the arbitrator shall have no power to vary or modify any of the provisions of the Loan Agreements.

In an entirely capitalized paragraph (which will not be capitalized herein), the agreement also states that "if the appointed arbitrator should award any damages, such damages shall be limited to actual and direct damages and shall in no event include consequential, punitive, exemplary or treble damages as to which borrower and lender expressly waive any right to claim to the fullest extent permitted by law." The Arbitrator concluded, and Plaintiffs argue, that these clauses are ambiguous. In his September 9 Declaration of Law and Limited Findings of Fact, the Arbitrator noted that neither state nor federal law forbids an arbitrator's award of punitive damages, nor do the rules of the American Arbitration Association. He thus characterized the parties' agreement as "promis[ing] that [Plaintiffs] can seek all damages allowed by law, and then that promise is taken away. This is the keystone of an ambiguous contract, and the Agreement is to be interpreted in [Plaintiffs'] favor."

The Court is mindful that the parties bargained for an arbitrator's decision, not a judicial decision, that deference is due to an arbitrator's interpretation of the parties' agreement, and that the grounds for vacating an award are quite narrow.

Nonetheless, this is a circumstance in which the award of punitive damages may, and must be, vacated.

In addition to the grounds identified in the Federal Arbitration Act, an award may be vacated if it is completely irrational or manifestly ignores the law. A decision is irrational if it fails to draw its essence from the agreement to arbitrate; this does not allow the Court to set the award "aside simply because we might have interpreted the agreement differently or because the arbitrators erred in interpreting the law or in determining the facts. Rather, the contract must not be susceptible of the arbitrator's interpretation." *Hoffman v. Cargill Inc.*, 236 F.3d 458, 462 (8th Cir. 2001); *see also Boise Cascade Corp. v. Paper Allied-Indus., Chemical and Energy Workers, Local 7-0159*, 309 F.3d 1075, 1081 (8th Cir. 2002) ("We may not vacate the award simply because we disagree with [the arbitrator's] interpretation, unless that interpretation so directly contradicts the plain meaning of the parties' agreement that it effectively rewrites it."); 9 U.S.C. § 10(a)(4).

After reviewing the documents in question, the Court respectfully disagrees with the Arbitrator's conclusion that the availability of punitive damages is ambiguous. The parties identified three sources of rules to govern their arbitral obligations, and declared that one – their written agreement – would govern in the event of any conflict between them. The parties also specifically agreed that the arbitrator could not award punitive damages. This is not amenable to an interpretation that punitive damages could be awarded, and the Court concludes the Arbitrator exceeded his authority in awarding them.[3]

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[3] The Arbitrator's award conveys his sense of outrage, which appears completely justified based on his findings regarding

[Footnote continued on next page]

Consequently, the Arbitrator's Award (as amended) is confirmed in part and vacated in part. Each Plaintiff is entitled to $2,000, this obligation to be borne jointly and severally by EMC and the law firm. EMC shall pay $22,780 in attorney fees as well as all costs and Arbitrator fees. SPvG and Scott Greenberg are dismissed. The award of punitive damages is vacated.

IT IS SO ORDERED.

/s/
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: May 8, 2003

[Footnote continued from previous page]

EMC's conduct in this matter. Were it not for the Court's obligation to confine the scope of arbitration to matters the parties actually agreed to arbitrate, the punitive damage award (or some part of it) would stand.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2366

Stanley William Stark, *et al.*,	*	
	*	
	*	
Appellants,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
	*	
vs.	*	
	*	
Sandberg, Phoenix & von Gontard, P.C., *et al.*,	*	
	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Wollman, Judge Riley, and Judge Gruender would grant the petition for rehearing en banc.

(5128-010199)

November 5, 2004

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

DONALD L. MASON
409 West 68th Street,
Kansas City, Missouri 64113-1918
816-363-0149
dmason7@kc.rr.com

Arbitration & Mediation [SSN omitted]

September 9, 2002

ARBITRATOR'S DECLARATION OF LAW AND LIMITED FINDINGS OF FACT

By agreement of the parties the plaintiff's presented their evidence, with exceptions, at the hearing held on 8/29/02, after which the arbitrator would declare as a matter of law if the plaintiff's could seek punitive damages in light of the specific provision in the Arbitration Agreement that the Arbitrator could not award such damages, and whether the plaintiff's made a submissable case for such damages against any of the defendants.

I have studied Judge Smith's order to arbitrate, and the pleadings prompting that Order, and I do not find indication that either issue was presented, or ruled by Judge Smith.

The Agreement to Arbitrate and the Arbitration Agreement found in the Deed of Trust, noted by Judge Smith to be the same, is signed by EMC's predecessor and the Plaintiffs. The other defendants have agreed to be governed by Arbitration Agreement as agents of EMC.

The Agreement selects Missouri as the choice of laws. Missouri courts have repeatedly found favor with the statutory

Arbitration laws. On a preemption basis Missouri would be governed by the Federal Arbitration Act. Those laws do not prohibit the award of punitive damages.

The Agreement also states that the Rules of Arbitration of the American Arbitration Association shall prevail except where in conflict with the Agreement.

Punitive damages can be awarded in AAA cases.

The Agreement specifically states that the Arbitration cannot award punitive damages.

In at least three places the Stark's are promised that they can seek all damages allowed by law, and then that promise is taken away. This is the keystone of an ambiguous contract, and the Agreement is to be interpreted in their favor. As a matter of law they are not prohibited from seeking punitive damages from EMC.

From the evidence heard I make the limited finding of fact that the plaintiffs made a submissable case against EMC only, but not the other defendants, as agents of EMC.

The financial records of EMC requested shall be supplied to Mr. True within four business days of this order. The objection to the production by the other defendants is sustained and those records may be returned to the parties.

The arbitration hearing will reconvene at 10:00 a.m. on Thursday, September 26, 2002 at Mr. True's office. If this setting presents a conflict please advise. I suggest we complete plaintiff's case, then defendants evidence, then rebuttal and surrebuttal, if any.

Hopefully medical problems will not delay my final Award.

/s/
DONALD L. MASON, ARBITRATOR

All Attorneys
Judge Ortrie Smith, case no. 01-0407-CV-W-3-ECF

APPENDIX E

DONALD L. MASON
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816-363-0149
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Arbitration & Mediation [SSN omitted]

November 25, 2002

ARBITRATORS AWARD

I have considered, and perhaps identified, testimony and documentation which I consider pertinent to the issues submitted. As an expedient I will not recite all the facts in detail.

The plaintiffs, husband and wife, live in Holden a small community of about 3000 located southeast of Kansas City. They could be described as working class people, probably not educated beyond high school, and not very articulate. The house and real estate involved located at 205 North Vine was purchased by Mr. Stark's parents in 1951, sold, and then repurchased in 1958. The property was received by the plaintiffs in 1977 "as an inheritance after down payment". The plaintiff's resided in and raised their family in the house thereafter.

Sometime prior to 1999 the plaintiff's and their son started a photography business in Warrensburg, Mo. This business operated by the son incurred indebtedness for the purchase of equipment and other expenses. These expenses were paid by credit card, using assets from Mr. Stark's 401[k] plan at

work, and ordinary income. These business expenses became overwhelming causing the Stark's to borrow heavily from United Lending Corp, using their house as security. They signed a note in the amount of $56,900.00 in January, 1999, with a Deed of Trust. At that time the real estate had a value $50,000.00 with the appraised value of $60,000.00

This loan did not alleviate their financial problems as they filed a Petition in bankruptcy in April 2000, represented by Mr. Roy True. Near the same time United Lending was also engaged in bankruptcy proceedings. In July, 2000 EMC purchased 52,000 notes from United, including plaintiff's, which was then in default. EMC became a debt collector under FDCPA.

In May, 2000 Mr. Greenberg motioned the Court to lift the automatic stay, which was granted in June, 2000. In responding to this motion True raised issues which declared that his representation of the Stark's was beyond the parameters of the bankruptcy proceeding. The Stark's were discharged in bankruptcy in October, 2000.

The plaintiffs stated they were embarrassed, felt some worry, mental and marital strain about the bankruptcy and their financial future. Their business failure and bankruptcy was known to some members of the community. Mr. Stark felt that he had let the family down because he had "lost" the house.

On February 15, 2000 True wrote to United that he represented the Stark's and exerted recission of the note and HOEPA violations, issues beyond the normal parameters of bankruptcy court proceedings.

On October 13,2000 EMC acknowledged to Stark's the purchase of their note. On October 26, 2000 EMC sent another letter to plaintiffs concerning their indebtedness. On December 18,2000 EMC sent a Western Union letter to the plaintiff's. This last letter was acknowledged by True and told

them they should not contact his clients. On March 12, 2001 Greenberg sent "notice of acceleration" letter to Mr. Stark. On March 23.2001 Greenberg sent a "notice of foreclosure sale" to Mr. Stark. On March 22,2001 foreclosure publication was commenced but for reasons not given was discontinued and the foreclosure did not occur. To this date the Stark's remain the title owner of the real estate and improvements.

On April 12,2001 the instant case was filed and on March 15,2001 all defendants waives service of process and enter their appearances.

On June 3,2001 Sharla McDaniel, an acknowledged agent of EMC, without notice or consent, forcibly entered the house and posted a sign, in large letters, on the front room window stating "Property has been secured or winterize. Not for sale or rent. In case of emergency call 1st American 732 363-3626." Ms. McDaniel also contacted Mrs. Stark at her across the street apartment. Near this same time Mr. Stark was contacted at his work by another EMC employee. On November 5, 2001 EMC wrote the plaintiffs re. Insurance coverage. Ditto on January 27, 2002.

EMC offered the testimony of an employee as to the perils involved with vacant property. This was generalized testimony and none of those perils were attributed to the Stark property. Her testimony was not pertinent and deserves no further consideration. It was suggested that EMC agent forceably entered the house for protection purposes. This is not what the sign said. Even in a small town you don't protect a house by posting a sign. In fact this could advertise that the house is vacant and lead to vandalism or other perils.

The Stark's testified that the activities by EMC by correspondence and otherwise caused them physical and emotional discomfort. Of this I have not the slightest doubt even though medical attention was not required. They are entitled to minimal actual damages each of $1000.00 payable by

EMC. They also seek other actual damages for apartment rental, phone charges, etc. but I do not consider them true damages against any defendant.

The FDCPA was repeatedly violated by EMC. The facts will support more than I Identify, On February 15, 2000 Mr. True wrote United, EMC's assignor, that he represented the Stark's and asserted issues that clearly indicated that his representation extended to the note and indebtedness, and beyond the parameters of the bankruptcy proceedings. EMC received assignment in July,2000. In responsive pleadings to lift the automatic stay in May, 2000 made allegations that his representation included the note and the indebtedness. EMC and the law firm had actual knowledge the scope of True's representation. By law both EMC and the law firm were in the role of a debt collector. They continued to repeatedly contact the Stark's rather than their attorney. The letters of "acceleration" and "foreclosure" required by law should have been sent to True not to the plaintiff's. I am mindful that these letters were sent in the representation their client. On February 28, 2001 True wrote to EMC that he represented the Stark's. EMC continued to contact the Stark's, and continued to September, 2002.

The insurance letters of October, 2001 and January, 2002 were deceptive. They state that the insurance premium would be charged to the Stark's escrow account. EMC knew that the Stark's had not made a house payment for more than a year and a half and that they had been discharged from the debt obligation a year earlier.

The only point of interest between EMC and the Stark's was the note. It is obvious that EMC's activities were directed toward seeking payment or affirmation of the note.

The plaintiff's are entitled to statuary damages of $1000.00 each payable equally by the law firm and EMC. However the law firm was acting entirely in its representation of the

note holder and is entitled to indemnification and judgment over against EMC in the in the amount of $1000.00.

The plaintiff,s are also entitled to reasonable attorney's fees. Mr. True stated the hourly rate and the hourly rate of his paralegals. These hourly rates are not disputed. He submitted time sheets for himself and for his paralegals. These time sheets don't show the services performed. His total attorney fee claim is in excess of $34,000.00. I have no way of verifying this claimed amount In the absence of a record of services performed. In mentally reconstructing the time necessary to adequately provide the necessary legal services, and other criteria to be considered, I arrive at a reasonable attorney fee of $22, 780.00 to be paid by EMC.

It is a simple procedure to complete foreclosure. Why EMC did not do so is unexplained. Instead EMC forcefully entered the premises still in legal title with the Stark's and exercised dominion over the property. At the very least a misdemeanor trespass was committed. Although the Stark's had moved from the premises on the advice of counsel they had not abandoned the premises. I find this conduct reprehensible and outrageous and in total disregard of plaintiff's legal rights. They are entitled to punitive damages which are not precluded by the arbitration agreement which has been declared ambiguous. Pretrial True requested financial data of EMC. He was furnished financial data of the parent corporation, Bear, Stearns, with explanation that as a subsidiary EMC does not have separate financial records. The data entered in evidence was obtained by both parties from the Internet.

Even in this era of publicized corporate malfeasance and misfeasance I find it difficult to believe that the CEO and Board of Directors of a large publicly traded corporation [Bear, Sterns] would not have financial information on a wholly owned subsidiary. How are they going to assess the performance of the officers and managers of that subsidiary? I

will accept the information provided. That information does not identify the net worth of Bear, Sterns. It has total assets of $186,627,844,000.00. Stockholders equity is $5,963,258,000.00 with each of the 146,873,990 shares having a book value of $37.16.

Being mindful that the purpose of punitive damages is not to reward the plaintiff but to punish the defendant and to deter others from like conduct the plaintiff's are awarded punitive damages In the amount of $6,000,000.00. At one percent of shareholders equity this is not great punishment but it should act as a deference.

IT IS THEREFORE ORDERED that the plaintiffs shall each recover the sum $1,000.00 for actual damages from EMC. They each shall recover the sum $1,000.00 for statutory damages to be paid equally by Sandberg, Phoenix & von Gontard, P.C. and EMC. EMC shall indemnify and pay to the law firm the sum of $1,000.00. EMC shall pay to the plaintiffs as and for attorney fees the sum of $22,780.00. The plaintiffs shall have and recover from EMC the sum of $6,000,000.00 as and for punitive damages. Defendant SPvG Trustee, Inc. is discharged with its costs. The Arbitrator's fee, at the agreed hourly rate, is $9,300.00 to be paid by EMC, the non-prevailing party. All costs are assessed against EMC.

DONALD L. MASON
ARBITRATOR

/s/

Copy: All attorneys and Judge Ortrie Smith

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CHARLES EVANS WHITTAKER COURTHOUSE
400 EAST NINTH STREET, SUITE 8552
KANSAS CITY, MISSOURI 64106

Chambers of
Ortrie D. Smith
District Judge

(816) 512-5645
Facsimile
(816) 512-5658

May 9, 2003

Roy True
Attorney at Law
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Kansas City, MO 64114-1117

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Keith D. Price
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515 North Sixth Street
St. Louis, MO 63101-1880

Leonard Lyle Wagner
Robert Bruce Best, Jr.
Husch & Eppenberger, LLC
12000 Main St.
Suite 1700
Kansas City, MO 64105

Re: Stark v. Sandberg, Phoenix & von Gontard, P.C., *et al.*
Case No. 01-0407-CV-W-ODS

Gentlemen:

Enclosed please find a copy of a letter I received from Judge Mason addressing the amount of punitive damages he intended to award. I forward it for whatever value it may have in further proceedings.

Sincerely,

Ortrie D. Smith
United States District Judge

ODS/kh

Enclosure

MAY 9 2003

Donald L. Mason
409 West 68th Street,
Kansas City, Missouri 64113-1918
816-363-0149
dmason7@kc.rr.com

Arbitration & Mediation [SSN omitted]

May 8,2003

Honorable Ortrie Smith
Federal Courthouse
400 East Ninth Street,
Kansas City, Missouri 64106

Re: Stark v. Sandberg, Phoenix & von Gontard, P.C., *et al*

Dear Judge Smith;

This in response to fn 1 of your order and hopefully I am not out of order.

I intended to award $6 Million in punitive damages. The 1 one percent of shareholder value' was surplusage and demonstrates only my lack of mathematical skills. It also demonstrates that I did not seek calculator or paper computation. These errors created a false issue, for which I apologize.

At your sole discretion you may forward copies of this letter to all attorneys

Respectfully,

ARBITRATOR

ARBITRATION PROCEEDING UNDER FEDERAL ARBITRATION ACT

Stanley William Stark,	)
Patricia Garnet Stark,	)
	)
Claimants	)
	)
v.	)
	)
Sandberg, Phoenix & von Gontard	)
P.C.	)
Scott Greenberg	)
EMC Mortgage Corporation	)
SPvG, Inc.	)
	)
Respondents.	)

ORDER

The arbitrator heard argument of counsel and read suggestions submitted pertaining to Claimants' and Respondents' request for discovery and objections thereto.

It is therefore ordered that said respective objections are overruled and each side shall on or before August 12, 2002 submit to the other side the documents and information requested by discovery.

It is further ordered that the parties shall not disclose or further disseminate or distribute the documents provided and at the completion of the arbitration proceeding shall return all documents received form the other side including any copies and the information disclosed shall be used for this arbitration proceeding only.

It is further ordered Respondents' Motion to Dismiss punitive damage claims pretrial is overruled.

It is so ordered this July 25, 2002.

/s/
Donald L. Mason, Arbitrator

APPENDIX F

Relevant Statutory Provisions

Section 10(a) of the Federal Arbitration Act (FAA), ch. 392, 61 Stat. 672 (1947), **[as amended]** provides:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

Section 1692k(a) of the Fair Debt Collection Practices Act (FDCPA) provides:

(a) Amount of damages. Except as otherwise provided by this section, any debt collector who fails to comply with

any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. § 1692k(a).

APPENDIX G

Loan No: 035601007572 Data ID: 918
Borrower: STANLEY W. STARK

ACKNOWLEDGMENT AND AGREEMENT TO MEDIATE OR ARBITRATE

THIS ACKNOWLEDGMENT AND AGREEMENT TO MEDIATE OR ARBITRATE is made by and between undersigned Borrower ("Borrower") and UNITED COMPANIES LENDING CORPORATION® ("Lender").

At or before the execution of my Note and Security Instrument and all other instruments executed in conjunction with the Note and Security Instrument on property located at 205 N. VINE, HOLDEN, MISSOURI 64040 ("Property"), Borrower willingly and voluntarily acknowledges, covenants and agrees with Lender to the following:

I. AGREEMENT TO MEDIATE OR ARBITRATE

READ THIS AGREEMENT CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO GO TO COURT. In this agreement to mediate or arbitrate (the "Agreement"), (1) "Transaction" means any (a) payment of money, (b) transfer or exchange of property or any other thing of value, (c) any one or more past, present, or future extensions of, advertisement, solicitation, applications for, or inquiries about, credit, or forbearances of payment, such as a loan, a credit sale, or otherwise, from Lender or Borrower, including this Transaction, (d) gift, or (e) promise to enter into a Transaction, and (2) "Claim" means any case, controversy, dispute, tort, disagreement, lawsuit, claim, or counterclaim, and other matters in question

now or hereafter existing between Lender and Borrower. A Claim includes, without limitation, anything arising out of, in connection with, or relating to: (a) this Agreement; (b) to the advertisements, solicitation, application, processing, closing or servicing of this Transaction or any instruments executed in conjunction with it (collectively the "Loan Agreements" including but not limited to the terms of the loan, representations, promises, undertakings or covenants made relating to the Loan, or Loan Agreements executed in conjunction with the Note and the Security Instruments, services provided under the Loan Agreements, and the validity and construction of the Loan Agreements); (c) any Transaction, (d) the construction, manufacture, advertisement, sale, installation or servicing of any real or personal property which secures this Transaction, (e) any past, present, or future insurance, service, or product that is offered or sold in connection with this Transaction; (f) any documents or instruments that contain information about or document any Transaction, insurance, service, or product; and (g) any act or omission by Lender regarding any Claim.

Mediation. Except as set forth below, all Claims, shall be **MEDIATED** prior to the filing of any legal proceeding related to any dispute relating to this Transaction. If Borrower and Lender cannot agree on the selection of a mediator for a dispute, the mediator shall be selected as follows: within 5 business days of the notice that either Borrower or Lender have decided to mediate, Borrower and Lender shall each name a mediator and notify that mediator and the other party of the selection. Within 5 business days of their selection the mediators shall jointly select an independent mediator to mediate the dispute. The mediation shall occur not later than 30 days after the mediator is selected at a time and place mutually convenient to all parties within a fifty-mile radius of Borrower's residence.

Borrower and Lender agree to participate in the mediation in good faith with the intention of resolving the dispute, if possible. Legal counsel may, but is not required to represent Borrower or Lender at the mediation. All mediation sessions will be private and all information disclosed during the mediation will be confidential. The mediator may prescribe other rules for the mediation. Expenses of the mediation including the mediator's fee shall be shared equally between Lender and Borrower. Attorneys' fees and related expenses are each party's responsibility.

This Agreement to mediate is specifically enforceable.

If for any reason the mediation is not completed within 45 days after the mediator is selected, or if after the mediation, any Claim is still unresolved, such Claim shall be resolved solely and exclusively by arbitration in accordance with this Agreement.

Arbitration. To the extent allowed by applicable law, any Claim except those set forth below, shall be resolved by binding arbitration in accordance with (1) the Federal Arbitration Act, 9 U.S.C. §§ 1-9; (2) the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association (the "Arbitration Rules") then in effect, and (3) this Agreement. If the terms of this Agreement and the Arbitration Rules are inconsistent, the terms of this Agreement shall control. A copy of the Arbitration Rules, free of charge, may be obtained by calling (800) 778-7879. The laws applicable to the arbitration proceeding shall be the laws of the state in which the property which secures the Transaction is located. The parties agree that the arbitrator shall have all powers provided by law, this Agreement, and the Loan Agreements. However, the arbitrator shall have no power to vary or modify any of the provisions of the Loan Agreements. Any party to this Agreement may bring an action in any court having jurisdiction, including a summary or expedited proceeding, to specifically enforce this Agreement, or

to compel arbitration of any Claim. An action to specifically enforce this Agreement, or a motion to compel arbitration may be brought at any time, even after a Claim has been raised in a court of law or a Transaction has been completed, discharged, or paid in full.

Place of Arbitration. The arbitration shall be conducted in the county of Borrower's residence, or at any other place mutually acceptable to the Lender and the Borrower.

Time of Hearing. The arbitration hearing shall commence within forty-five (45) days of the demand for arbitration.

NO CLASS ACTIONS; NO JOINDER OF PARTIES; WAIVER OF RIGHT TO JURY TRIAL. THE ARBITRATION WILL TAKE THE PLACE OF ANY COURT PROCEEDING INCLUDING A TRIAL BEFORE A JUDGE OR A JUDGE AND JURY. ANY SUCH ARBITRATION SHALL BE CONDUCTED ON AN INDIVIDUAL BASIS, AND NOT AS PART OF A COMMON OR CLASS ACTION. IT IS EXPRESSLY ACKNOWLEDGED AND AGREED BY BORROWER AND LENDER THAT ANY PURPORTED COMMON ISSUES OF LAW OR FACT SHALL BE RESOLVED ON SUCH AN INDIVIDUAL BASIS. IF THE APPOINTED ARBITRATOR SHOULD AWARD ANY DAMAGES, SUCH DAMAGES SHALL BE LIMITED TO ACTUAL AND DIRECT DAMAGES AND SHALL IN NO EVENT INCLUDE CONSEQUENTIAL, PUNITIVE, EXEMPLARY OR TREBLE DAMAGES AS TO WHICH BORROWER AND LENDER EXPRESSLY WAIVE ANY RIGHT TO CLAIM TO THE FULLEST EXTENT PERMITTED BY LAW.

Judgment. The award rendered by the arbitrator shall be final, nonappealable and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Confidentiality. Borrower and Lender agree that the mediation and arbitration proceedings are confidential. The information disclosed in such proceedings cannot be used for any purpose in any other proceeding.

Claims Excluded from Mediation and Arbitration. Notwithstanding the foregoing, neither Borrower or Lender can require the other to mediate or arbitrate (i) foreclosure proceedings, whether pursuant to judicial action, power of sale, assent to a decree or otherwise, proceedings pursuant to which Lender seeks a deficiency judgment, or any comparable procedures allowed under applicable law pursuant to which a lien holder may acquire title to or possession of any property which is security for this Transaction and any related personal property (including an assignment of rents or appointment of a receiver), upon default by the Borrower on the Transaction or (ii) an application by or on behalf of the Borrower for relief under the federal bankruptcy laws or any other similar laws of general application for the relief of debtors, through the institution of appropriate proceedings; or (iii) any Claim where Lender seeks damages or other relief because of Borrower's default under the terms of a Transaction. Enforcement of this section will not waive the right to arbitrate any other Claim, including a Claim asserted as a counterclaim in a lawsuit brought under this section.

Effect of Rescission. If Borrower has the right to rescind this Transaction, rescinding it will not rescind this Agreement.

No Other Arbitration Agreements. This Agreement is the only agreement between Lender and Borrower regarding alternative dispute resolution, and supersedes any prior agreements to mediate or arbitrate Claims. This Agreement may only be modified by a written agreement between Lender and Borrower.

BORROWER AND LENDER AGREE TO WAIVE ANY RIGHTS TO TRIAL BY JURY OF ANY AND ALL CLAIMS.

II. ONLY WRITTEN LOAN AGREEMENTS

1. The rights and obligations of Borrower and Lender shall be determined solely from the written Loan Agreements, and any prior oral agreements between Lender and Borrower are superseded by and merged into the Loan Agreements.

2. The Loan Agreements may not be varied by any oral agreements or discussions that occur before, contemporaneously with, or subsequent to the execution of the Loan Agreements.

3. Please note:

   THE WRITTEN LOAN AGREEMENTS REPRESENT THE FINAL AGREEMENTS BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.

   THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

III. BROKER AUTHORIZATION

In the event a Broker participated in obtaining this loan, Borrower has authorized the Broker to submit an application for a loan to Lender to be secured by Borrower's real estate and agrees to indemnify and hold Lender harmless from any and all liability for any acts or omissions by the Broker. Borrower confirms that the Broker is solely Borrower's agent and not Lender's agent and Borrower understands that the Broker has not authority to make any agreements, representations or warranties on Lender's behalf or to represent Lender in any respect. Borrower also understands the Lender is not

obligated in any way to make a loan to Borrower and that Lender may accept or reject Borrower's application for a loan in Lender's sole discretion or propose terms other than those contained in Borrower's application.

Borrower represents that I have received and read a copy of this Acknowledgment and Agreement to Mediate or Arbitrate at or before the execution of my Loan Agreements, and that the Closing Agent has read and explained each of the provisions of this Acknowledgment and Agreement to Mediate or Arbitrate to me, which provisions I understand and accept. Borrower also represents that any fees or payments to the Lender which I have made in connection with the Loan were voluntarily made only to Lender and were for necessary and reasonable fees or payments to the Loan may be closed according to standard industry practices.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

Date: 1-23-99

/s/	/s/
PATRICIA G. STARK	STANLEY W. STARK
Borrower	Borrower

I have read and explained each of the above provisions to Borrower.

CLOSING AGENT	DATE

APPENDIX H

Return to: UNITED COMPANIES LENDING®
CORPORATION
4240 BLUE RIDGE BLVD.
KANSAS CITY, MO 64133
_____(Space above this line for recording date)_____

Loan No.: 035601007572
Borrower: STANLEY W. STARK

DEED OF TRUST

NOTICE TO ASSIGNEE

NOTICE: This is a mortgage subject to special rules under the federal Truth in Lending Act. Purchasers or assignees of this mortgage could be liable for all claims and defenses with respect to the mortgage that the borrower could assert against the creditor.

THIS DEED OF TRUST ("Security Instrument") is made on the 23rd day of January, 1999. The grantor is STANLEY W. STARK AND PATRICIA G. STARK, HUSBAND AND WIFE ("Borrower"). The trustee is ALAN E. SOUTH ("Trustee"). The beneficiary is UNITED COMPANIES CORPORATION®, A CORPORATION, which is organized and existing under the laws of the State of LOUISIANA, and whose address is 4041 ESSEN LANE, BATON ROUGE, LOUISIANA 70809 ("Lender"). Borrower owes Lender the principal sum of FIFTY-SIX THOUSAND NINE HUNDRED and NO/100----Dollars (U.S. $56,900.00). This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if

not paid earlier, due and payable on February 1, 2019. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in JOHNSON County, Missouri:

SEE LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF

which has the address of 205 N. VINE, HOLDEN, Missouri 64040 ("Property Address");

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal and Interest; Prepayment and late Charges. Borrower shall promptly pay when due the principal of and interest on the debt evidenced by the Note and any prepayments and late charges due under the Note.

2. Funds for Terms and Insurance. Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the note is paid in full, a sum ("Funds") for: (a) yearly taxes and assessments which may attain priority over this Security Instrument as a lien on the Property; (b) yearly leasehold payments or ground rents on the Property, if any; (c) yearly hazard or property insurance premiums; (d) yearly flood insurance premiums, if any; (e) yearly mortgage insurance premiums, if any; and (f) any sums payable by Borrower to Lender, in accordance with the provisions of paragraph 8, in lieu of the payment of mortgage insurance premiums. These items are called "Escrow Items." Lender may, at any time, collect and hold Funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may required for Borrower's escrow account under the federal Real Estate Settlement Procedures Act of 1974 as amended from time to time, 12 U.S.C. § 2061 *et seq.* ("RESPA"), unless another law that applies to the funds sets a lesser amount. If so, Lender may, at any time, collect and hold Funds in an amount not to exceed the lesser amount. Lender may estimate the amount of Funds due on the basis of current da and reasonable estimates of expenditures of future Escro Items or otherwise in accordance with applicable law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is such an institution) or in any Federal Home Loan Bank. Lender shall apply the Funds to

pay the Escrow Items. Lender may not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. However, Lender may require Borrower to pay a one-time charge for an independent real estate tax reporting service used by Lender in connection with this loan, unless applicable law provides otherwise. Unless an agreement is made or applicable law requires interest to be paid, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender may agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds, showing credits and debits to the funds and the purpose for which each debit to the Funds was made. The Funds are pledged as additional security for all sums secured by this Security Instrument.

If the Funds held by Lender exceed the amounts permitted to be held by applicable law, Lender shall account to Borrower for the excess Funds in accordance with the requirements of applicable law. If the amounts of the Funds held by Lender at any time is not sufficient to pay the Escrow Items when due, Lender may so notify Borrower in writing, and, in such case Borrower shall pay to Lender the amount necessary to make up the deficiency. Borrower shall make up the deficiency in no more than twelve monthly payments, at Lender's sole discretion.

Upon payment in full of all sums secured by that Security Interest, Lender shall promptly refund to Borrower any Funds held by Lender. If, under paragraph 21, Lender shall acquire or sell the Property, Lender, prior to the acquisitions or sale of the Property, shall apply any Funds held by Lender at the time of acquisition or sale as a credit against the sums secured by this Security Instrument.

3. Application of Payments. Unless applicable law provides otherwise, all payments received by Lender under paragraphs 1 and 2 shall be applied: First, to any prepayment charges due under the Note; second, to amounts payable under paragraph 2; third, to interest due; fourth, to principal due; and last, to any late charges due under the Note.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines and imposition attributable to the Property which may attain priority over this Security Instrument, and leasehold payments or ground rents, if any. Borrower shall pay these obligations in the manner provided in paragraph 2, or if not paid in that manner, Borrower shall pay them on time directly to the person owed payment. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this paragraph. If Borrower makes these payments directly, Borrower shall promptly furnish to Lender receipts evidencing the payments.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

5. Hazard or Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included in the term "extended coverage" and any other hazards, for which

Lender requires insurance, including, but not limited to, floods or flooding, earthquakes or hurricanes (whether or not such hazards are required to be insured against at the time the Loan is made). All insurance required by Lender shall be maintained in the amounts and for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's approval, which shall not be unreasonably withheld. In the event the Property Improvements are now, or at any time during the term of this Security Instrument are determined to be, in a Special Flood Hazard Area, Borrower must obtain and maintain flood insurance.

Borrower acknowledges and agrees that failure to insure the Property, which is the security for this agreement, according to the terms and conditions of this paragraph 5 is an event of default subject to the remedies available to Lender under this Agreement. If Borrower fails to obtain or maintain any coverage described herein, Lender may, but shall have no duty to, obtain such coverage or substantially equivalent coverage with an insurance carrier of Lender's choice, protecting only Lender's interest in the Property in accordance with paragraph 7, all at Borrower's expense. Lender shall have no duty or obligation to obtain any insurance protecting Borrower's interest in the Property, or covering risks for which Lender has not required insurance coverage, including, without limitation, a homeowners policy. Lender may, in its sole discretion, obtain insurance in whatever amounts and types Lender deems adequate to protect Lender's interest in the Property, regardless of the unpaid balance remaining under the Note or the amounts remaining due under this Security Instrument. For this purpose, Lender will deem its interests to be adequately protected by an insurance policy with coverage equal to the value of the improvements located on the Property securing Borrower's loan. Lender may determine the value of the improvements by assuming as accurate the value assigned to the improvements in the insurance policy

that Lender's records reflect was most recently held by Borrower prior to the insurance policy obtained by Lender. Borrower acknowledges and agrees the amount may not be equal to the actual value or replacement value of the improvements, and any such insurance Lender obtains may not protect Borrower's interest in the Property.

Borrower acknowledges and agrees that the cost of the insurance coverage so obtained by Lender may significantly exceed the cost of insurance Borrower could have obtained, as described in the first paragraph of this paragraph 5, if protecting Borrower's interest in the Property. Borrower further acknowledges and agrees that Lender may obtain any such insurance directly or through an insurance agency or insurer affiliated with Lender and Lender or Lender's affiliate may receive a commission or other compensation in connection with obtaining such insurance.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard mortgage clause. Lender shall have the right to hold the policies and renewals. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. In the event that Borrower cancels a policy on the Property and Borrower replaces it with a different policy, Lender may charge Borrower a reasonable fee (subject to applicable law, if any), to change its response to reflect the new policy. In the event of loss, Borrower shall give prompt notice to the insurance carrier or lender. Lender may make proof of loss if not made promptly by Borrower. In the event Lender acquires the Property through foreclosure or otherwise, Borrower assigns to Lender its right to any refund of unearned premiums and any other rights of Borrower under the insurance policy.

To the extent Borrower obtains any form of insurance coverage for the Property without being directed to do so by Lender, such as flood, earthquake or hurricane coverage,

such policy shall include a standard mortgage clause and shall name Lender as mortgagee. Any insurance proceeds from such policy shall be additional security for the Note and Lender shall have the same rights to such policy and proceeds as it has with regard to Lender required insurance policies discussed in this paragraph 5.

Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, if, at Lender's sole discretion, the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction. Lender shall have the right to deduct fees for such inspections from the insurance proceeds unless prohibited by applicable law or regulation. Fees for public adjusters or other third parties retained by Borrower shall not be deducted from the proceeds and shall be the sole and separate obligation of Borrower. If, in Lender's sole determination, the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. Borrower shall remain responsible for any such remaining due and payable under the Note and this Security Instrument. If Borrower abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then the proceeds will be automatically assigned to Lender. Lender may use the proceeds to repair or restore the Property or to pay sums secured by this Security Instrument, whether or not then due. The 30-day period will begin when the notice is given.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or

postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of the payments of principal and interest due under the Note. If under paragraph 21 the Property is acquired by Lender, Borrower's right to any insurance policies and proceeds resulting from damage to the Property prior to the acquisition shall pass to Lender to the extent of the sums secured by this Security Instrument immediately prior to the acquisition.

The provisions contained in this paragraph 5 are subject to limitations under applicable law, if any.

6. Occupancy, Preservation, maintenance and protection of the Property; Borrower's Loan Applications; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall be in default if any forfeiture action or proceeding, whether civil or criminal, is begun that in Lender's good faith judgment could result in forfeiture of the Property or otherwise materially impair the lien created by this Security Instrument or Lender's security interest. Borrower may cure such a default and reinstate, as provided in paragraph 18, by causing the action or proceeding to be dismissed with a ruling that, in Lender's good faith determination, precludes forfeiture of the Borrower's interest in the Property or other material impairment of the lien created by this Security Instrument or Lender's security interest. Borrower may cure such a default and reinstate, as provided in paragraph 10, by causing the action or proceeding to be dismissed with a ruling that, in Lender's good faith determination, precludes forfeiture of the Borrower's interest in the Property or other material impairment of the lien created by

this Security Instrument or Lender's security interest. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to that Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

7. Protection of Lender's Rights in the Property. If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect the Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture or to enforce laws or regulations), ten lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. Although Lender may take action under this paragraph 7, Lender does not have to do so.

8. Mortgage Insurance. If Lender required mortgage insurance as a condition of making the loan secured by this Security Instrument, Borrower shall pay the premiums required to maintain the mortgage insurance in effect, at a cost substantially equivalent to the cost to Borrower of the mortgage insurance previously in effect, from an alternate mortgage insurer approved by Lender. If substantially equivalent mortgage insurance coverage is not available, Borrower shall pay to Lender each month a sum equal to one-twelfth of the

yearly mortgage insurance premium being paid by Borrower when the insurance coverage lapsed or ceased to be in effect. Lender will accept, use and retain these payments as a loss reserve in lieu of mortgage insurance. Loss reserve payments may no longer be required, at the option of Lender, if mortgage insurance coverage (in the amount and for the period that Lender requires) provided by an insurer approved by Lender again becomes available and is obtained. Borrower shall pay the premiums required to maintain mortgage insurance in effect, or to provide a loss reserve, until the requirement for mortgage insurance ends in accordance with any written agreement between Borrower and Lender or applicable law.

9. Inspection. Lender or its agent may make reasonable entries upon and inspections of the Property. Lender shall give Borrower notice as the time of or prior to an inspection specifying reasonable cause for the inspection.

10. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or the conveyance in lieu of condemnation, re hereby assigned and shall be paid to Lender.

In the event of a total taking of the Property, the proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. In the event of a partial taking of the Property in which the fair market value of the Proper immediately before the taking is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the taking, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Interest shall be reduced by the amount of the proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the taking, divided by (b) the fair market value of the Property immediately before the taking. Any

balance shall be paid to Borrower. In the event of a partial taking of the Property in which the fair market value of the Property immediately before the taking is less than the amount of the sums secured immediately before the taking, unless Borrower and Lender otherwise agree in writing or unless applicable law otherwise provides, the proceeds shall be applied to the sums secured by the Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, since notice by Lender to Borrower that the condemnor offers to make an award or settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the proceeds, at its option, either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of such payments.

11. Borrower Not Released; Forbearance By Lender Not A Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of borrower shall not operate to release the liability of the original Borrower or Borrower's successors in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payments or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 17. Borrower's covenants and agreements shall not be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower may agree to extend, modify, forbear or make any recommendations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

13. Loan Charges. If the loan secured by this Security Instrument is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owned under the Note or by making direct payment to Borrower. if a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge under the Note.

14. Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any other

address Lender designates by Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

15. Governing Law; Severability. This Security Instrument has been governed by federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provision of this Security Instrument and the Note are declared to be severable.

16. Borrower's Copy. Borrower shall be given one conformed copy of the Note and of this Security Instrument.

17. Transfer of the Property or a Beneficiary Interest in Borrower. If all or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Interest.

18. Borrower's Right to Reinstate. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instruments discontinued at any time prior to the earlier of: (a) 5 days (or such other period as applicable law may specify for reinstatement) before sale of the Property pursuant to any power of sale contained in this Security Instrument; or (b) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other cove-

nants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees of up to 15.00% of the sums due under the Note described above or the amount allowable under applicable state law, and (d) takes such action as Lender may reasonably require to assure that the lien of this Security Instrument, Lender's right in the Property and Borrower's obligation to pay the sums secured by this Security Investment shall continue unchanged. Upon reinstatement by Borrower, this Security Instrument and the obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under paragraph 17.

19. Sale of Note; Change of Loan Servicer. The Note or a partial interest in the Note (together with this Security Instrument) may be sold one or more times without prior notice to Borrower. A sale may result in a change in the entity (known as the "Loan Servicer") that collects monthly payments due under the Note and this Security Instrument. There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change in accordance with paragraph 14 above and applicable law. The notice will also contain any other information required by applicable law.

20. Hazardous Substances. borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, not allow anyone else to do, anything affecting the Property that is in violation of any Enforcement Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of Hazardous Substances affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 20, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 20, "Environmental Law means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protections.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

21. Acceleration; Remedies. Following Borrower's breach of any covenant or agreement in this Security Instrument, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by applicable law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 21, including, but not limited to, reasonable attorneys' fees of up to 15.00% of the sums due under the Note described above or the amount allowable under applicable state law and costs of title evidence.

If Lender invokes the power of sale, Lender or Trustee shall mail copies of a notice of sale in the manner prescribed

by applicable law to Borrower and to the other persons prescribed by applicable law. Trustee shall give notice of sale by public advertisement for the time and in the manner prescribed by applicable law. Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder for cash at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property to any later time on the same date by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's fees and attorneys' fees of up to 15.00% of the sums due under the Note described above or the amount allowable under applicable state law; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

22. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release the Security Instrument to Borrower. To the extent permitted by applicable law, Borrower is responsible for all costs associated with canceling this Security Instrument including, but not limited to, any fee paid to a third party for the preparation and recordation of any legal document as well as any fee paid to a public official.

23. Substitute Trustee. Lender, at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder by an instrument recorded in the county in which this Security Instrument is re-

corded. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by applicable law.

24. Lease of the Property. Trustee hereby leases the Property to Borrower until this Security Instrument is either satisfied and released or until there is a default under the provisions of this security Instrument. The Property is leased upon the following terms and conditions: Borrower, and every person claiming an interest in or possessing the Property or any part thereof, shall pay rent during the term of the lease in the amount of one cent per month, payable on demand, and without notice or demand shall and will surrender peaceable possession of the Property to Trustee upon default or to the purchaser of the Property at the foreclosure sale.

25. Agreement to Mediate or Arbitrate. READ THIS AGREEMENT CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO GO TO COURT. In this agreement to mediate or arbitrate (this "Agreement"), (1) "Transaction" means any (a) payment of money, (b) transfer or exchange of property or any other thing of value, (c) any one or more past, present, or future extensions of, advertisement, solicitation, applications for, or inquiries about, credits, or forbearance of payment, such as a loan, a credit sale, or otherwise, from Lender to Borrower, including this Transaction, (d) gift, or (e) promise to enter into a Transaction, and (2) "Claim" mean any case, controversy, dispute, tort, disagreement, lawsuit, claim, or counterclaim, and other matters in question now or hereafter exhibiting between Lender and Borrower. A Claim includes, without limitation, anything arising out of, in connection with, existing between Lender and Borrower. A Claim includes, without limitation, anything arising out of, in connection with, or relating to: (a) this Agreement; (b) to the advertisement, solicitation, application, processing, closing or servicing of this Transaction or any instruments executed in con-

junction with it (collectively the "Loan Agreement" including but not limited to the terms of the loan, representations, promises, undertakings or covenants made relating to the Loan, or Loan Agreements executed in conjunction with the Note and this Security Instrument, services provided under the Loan Agreements, and the validity and construction of the Loan Agreements); (c) any Transactions; (d) the construction, manufacture, advertisement, sale, installation or servicing of any real or personal property which secures this Transaction; (e) any past, present, or future insurance, service, or product that is offered or sold in connection with a Transaction; (f) any documents or instruments that contain information about or document any Transaction, insurance, service, or product; and (g) any act or omission by Lender regarding any Claim.

Mediation. Except as set forth below, all Claims, shall be MEDIATED prior to the filing of any legal proceeding related to any dispute relating to this Transaction. If Borrower and Lender cannot agree on the selection of a mediator for a dispute, the mediator shall be selected as follows: within 5 business days of the notice that either Borrower or Lender have decided to mediate, Borrower and Lender shall each name a mediator and notify the mediator and the other party of the selection. Within 5 business days of their selection the mediators shall jointly select an independent mediator to mediate the dispute. The mediation shall occur not later than 30 days after the mediator is selected at a time and place mutually convenient to all parties within a fifty-mile radius of Borrower's residence.

Borrower and Lender agree to participate in the mediation in good faith with the intention of resolving the dispute, if possible. Legal counsel may, but is not required to represent Borrower or Lender at the mediation. All mediation sessions will be private and all information disclosed during the mediation will be confidential. The mediator may prescribe

other rules for the mediation. Expenses of the mediation including the mediator's fee shall be shared equally between Lender and Borrower. Attorneys' fees and related expenses are each party's responsibility.

This Agreement to mediate is specifically enforceable.

If for any reason the mediation is not completed within 45 days after the mediator is selected, or if after the mediation any Claim is still unresolved, such Claim shall be resolved solely and exclusively by arbitration in accordance with this Agreement.

Arbitration. To the extent allowed by applicable law, any Claim, except those set forth below, shall be resolved by binding arbitration in accordance with (1) the Federal Arbitration Act, 9 U.S.C. §§ 1-9; (2) the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association (the "Arbitration Rules") then in effect; and (3) this Agreement. If the terms of this Agreement and the Arbitration Rules are inconsistent, the terms of this Agreement shall control. A copy of the Arbitration Rules, free of charge, may be obtained by calling (800) 778-7879. The laws applicable to the arbitration proceeding shall be the laws of the state in which the property which secures the Transaction is located. The parties agree that the arbitrator shall have all powers provided by law, this Agreement, and the Loan Agreements. However, the arbitrator shall have no power to vary or modify any of the provisions of the Loan Agreements. Any party to this Agreement may bring an action in any court having jurisdiction, including a summary or expedited proceeding, to specifically enforce this Agreement, or to compel arbitration of any Claim. An action to specifically enforce this Agreement, or a motion to compel arbitration may be brought at any time, even after a Claim has been raised in a court of law or a Transaction has been completed, discharged, or paid in full.

Place of Arbitration. The arbitration shall be conducted in the county of borrower's residence, or at any other place mutually acceptable to the Lender and the Borrower.

Timing of Hearing. The arbitration hearing shall commence within forty-five (45) days of the demand for arbitration.

NO CLASS ACTIONS; NO JOINDER OF PARTIES; WAIVER OF RIGHT TO JURY TRIAL. THE ARBITRATION WILL TAKE THE PLACE OF ANY COURT PROCEEDING INCLUDING A TRIAL BEFORE A JUDGE OR A JUDGE AND JURY. ANY SUCH ARBITRATION SHALL BE CONDUCTED ON AN INDIVIDUAL BASIS, AND NOT AS PART OF A COMMON OR CLASS ACTION. IT IS EXPRESSLY ACKNOWLEDGED AND AGREED BY BORROWER AND LENDER THAT ANY PURPORTED COMMON ISSUES OF LAW OR FACT SHALL BE RESOLVED ON SUCH AN INDIVIDUAL BASIS. IF THE APPOINTED ARBITRATOR SHOULD AWARD ANY DAMAGES, SUCH DAMAGES SHALL BE LIMITED TO ACTUAL AND DIRECT DAMAGES AND SHALL IN NO EVENT INCLUDE CONSEQUENTIAL, PUNITIVE, EXEMPLARY OR TREBLE DAMAGES AS TO WHICH BORROWER AND LENDER EXPRESSLY WAIVE ANY RIGHT TO CLAIM TO THE FULLEST EXTENT PERMITTED BY LAW.

Judgment. The award rendered by the arbitrator shall be final, nonappealable and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Confidentiality. Borrower and Lender agree that the mediation and arbitration proceedings are confidential. The information disclosed in such proceedings cannot be used for any purpose in any other proceeding.

Claims Excluded from Mediation and Arbitration. Notwithstanding the foregoing, neither Borrower or Lender can require the other to mediate or arbitrate (i) foreclosure proceedings, whether pursuant to judicial action, power of sale, assent to a decree or otherwise, proceedings pursuant to which Lender seeks a deficiency judgment, or any comparable procedure allowed under applicable law pursuant to which a lien holder may acquire title to or possession of any property which is security for this Transaction and any related personal property (including an assignment of rents or appointment of a receiver), upon default by the Borrower on the Transaction or (ii) an application by or on behalf of the Borrower for relief under the federal bankruptcy laws or any other similar laws of general application for the relief of debtors, through the institution of appropriate proceedings; or (iii) any Claim where Lender seeks damages or other relief because of Borrower's default under the terms of a Transaction. Enforcement of this section will not waive the right to arbitrate any other Claim, including a Claim asserted as a counterclaim in a lawsuit brought under this section.

Effect of Rescission. If Borrower has the right to rescind this Transaction, rescinding it will not rescind this Agreement.

No Other Arbitration Agreements. This Agreement is the only agreement between Lender and Borrower regarding alternative dispute resolution, and supersedes any prior agreements to mediate or arbitrate Claims. This Agreement may only be modified by a written agreement between Lender and Borrower.

BORROWER AND LENDER AGREE TO WAIVE ANY RIGHTS TO TRIAL BY JURY OF ANY AND ALL CLAIMS.

26. Riders to this Security Instrument. If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants and agreements of

each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument. [Check applicable box(es)]

- ☐ Adjustable Rate Rider
- ☐ Condominium Rider
- ☐ 1-4 Family Rider
- ☐ Graduated Payment Rider
- ☐ Planned Unit Development Rider
- ☐ Biweekly Payment Rider
- ☐ Balloon Rider
- ☐ Rate Improvement Rider
- ☐ Second Home Rider
- ☐ Other(s) (specify)

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISIONS WHICH MAY BE ENFORCED BY THE PARTIES.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

_____/s/_____ (Seal)
PATRICIA G. STARK - BORROWER

_____/s/_____ (Seal)
STANLEY W. STARK - BORROWER

Oral agreements or commitments to loan money, extend credit or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable. To protect you (borrowe(s)) and us (creditor) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it.